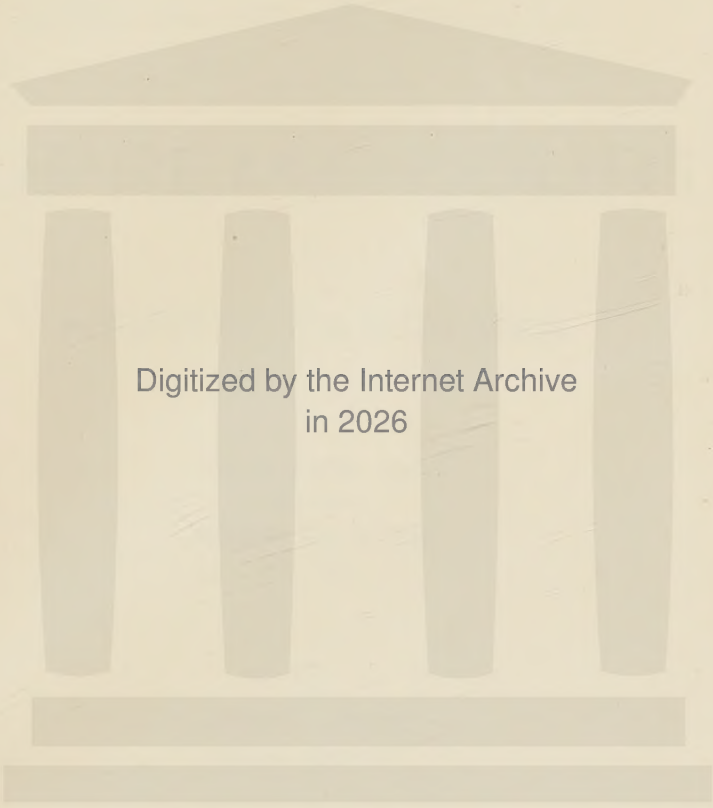
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ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 161

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1912
(IN PART)
SPRING TERM, 1913
(IN PART)

BY
ROBERT C. STRONG
STATE REPORTER

ANNOTATED BY
WALTER CLARK

RALEIGH
EDWARDS & BROUGHTON PRINTING CO.
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NORTH CAROLINA DURING THE FALL OF 1913

SUPREME COURT

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The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1913.
First District	August 26
Second District	September 2
Third District	September 9
Fourth District	September 16
Fifth District	September 23
Sixth District	September 30
Seventh District	October 7
Eighth and Ninth Districts	October 14
Tenth and Eleventh Districts	October 21
Twelfth District	October 28
Thirteenth District	November 4
Fourteenth District	November 11
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Seventeenth and Eighteenth Districts	November 25
Nineteenth District	December 2
Twentieth District	December 9

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1912

WHITE SEWING MACHINE COMPANY v. I. W. BULLOCK.

(Filed 4 December, 1912.)

1. Contracts—Vendor and Vendee—Fraud—Misrepresentations—Principal and Agent—Evidence—Questions for Jury.

A representation made by the agent of a vendor in the sale of 150 sewing machines, that he would give the vendee certain exclusive territory; that a certain agency therein was discontinued; that no further sales would be made through it; that the existing agency had on hand only three machines, when in fact a much greater number were on hand there, and at the time of the transaction an order had been accepted by the agent from such other agency of 100 machines to be sold in the territory promised the vendee, is not of a promissory character and upon conflicting evidence, and further evidence tending to show that the vendee would not othewise have made the purchase, a question of fraud is raised to be determined by the jury, as to whether the representation was a false statement of existing facts, calculated to deceive, intended to deceive, and which did deceive the vendee and formed a material inducement for the contract of purchase.

2. Same—Caveat Emptor.

When the agent of a vendor of sewing machines knowingly and fraudulently induces a contract of purchase upon the representation that the vendee was to have certain exclusive territory, and that a certain agency in a near-by town had been discontinued, which covered a part of the territory contracted for, etc., the vendee had a right to rely upon the truth of the assertion made by the vendee's agent, and it was not required of him that he verify the statement before entering into the contract, and the doctrine of *caveat emptor* does not apply.

3. Contracts—Vendor and Vendee—Fraud—Rescission—Notification—Rule of the Prudent Man.

The defendant having contracted with the plaintiff for the purchase of a large number of sewing machines, induced by the fraudulent mis-

representations of the latter's agent as to exclusive territory, when the agent knew at the time it was largely occupied by another to whom he had sold like articles, it was for the jury to determine whether the defendant acted as an ordinarily prudent man would have done in not sooner notifying the plaintiff of his election to rescind the transaction, under evidence tending to show that he so notified the plaintiff when he discovered the fraud while working the territory contracted for, about eighteen days after he could probably have sold any of the machines.

4. Contracts, Written—Parol Evidence—Fraud—Stipulations—Principal and Agent—Statute of Frauds.

The principle that a written contract may not be contradicted or varied by parol evidence has no application when the writing itself is attacked for fraud; for if the contract is vitiated by fraud, its provisions are carried with it, and a clause in a contract of sale that it may not be varied by the representations of the sales agent cannot have any effect if the contract itself falls. Instances in which promissory representations may be false and vitiate a written contract, as where they include misrepresentations of existing facts, cited and discussed by WALKER, J.

5. Contracts—Fraud—Rescission—Vendor and Vendee—Instructions—Evidence—Questions for Jury.

When, as in this case, a contract for the sale of goods has been induced by fraud, the vendee has a right to rescind the contract and return the goods, and under the evidence, and under proper instructions from the court, the question was for the jury.

BROWN and ALLEN, JJ., dissenting.

APPEAL by defendant from *Whedbee, J.*, at July Term, 1912, of GRANVILLE.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Hicks & Stem and T. T. Hicks for plaintiff.

B. S. Royster for defendant.

WALKER, J. We are unable to agree with the argument of (3) plaintiff's counsel in this case. There is no essential disagreement as to some of the principles of law stated by them, but the difference between us relates to their application to the facts of this case. The issues made by the pleadings should in our opinion, have been submitted to the jury upon the question of fraud. In order to a clear understanding of the matter, it will be necessary to state the substance, at least, of the case.

The evidence is as follows: I. W. Bullock testified: "Mr. Massey (agent of plaintiff) came to our store after dinner on 12 October, 1910, and said that he represented the White Sewing Machine Company; that there was a large territory in this (Granville) county that machines

could be handled in; and I asked him if Mr. Kittrell, of Oxford, had not been handling these machines; he told me that he had been handling them, but that he was not going to handle them any longer; that he was not going to sell any more machines to Mr. Kittrell; that Kittrell had only two or three of the machines of his company on hand. In consequence of this conversation, I signed the order, which is as follows": Then follows the order. It appears therefrom that defendant agreed to take 151 sewing machines at the price named. It was a "rush order." The order contains this stipulation: "This order is given subject to the approval of the White Sewing Machine Company, and if accepted or filled in full or in part, to be settled for at the price and terms above set forth. It is understood that no claim of any understanding or agreement of any nature whatever between this company and its dealers will be recognized except such as is embraced in written orders or is in writing and accepted by said company in writing from its home office at Cleveland, Ohio." Bullock & Co.'s store was at Creedmoor, where the order was given, and the order was signed at the time of the representations as to Kittrell's agency. I. W. Bullock further testified: "I relied upon the statement made to me by Mr. Massey. I signed the order in consequence of such statements. I afterwards found out that Mr. Kittrell was selling the same machine in Creedmoor. I stopped my men from selling the machine and notified the company that the machines were subject to their order. I wrote the following letter, dated 11 November, 1910:

"THE WHITE SEWING MACHINE COMPANY, (4)

"Cleveland, Ohio.

"GENTLEMEN:—Mr. Massey has just left here. I wrote for him to come and see about placing two cars of machines in same territory. Mr. Kittrell, of Oxford, has been handling your machines in this territory for some time. When Mr. Massey came to see about selling these machines, the first thing I asked him was about Mr. Kittrell selling this machine, and he told me that Mr. Kittrell had a few machines on hand, but would not sell any more. After he told me that Mr. Kittrell was not going to handle the White any more, and making other promises about selling these machines in a short while, I gave him the order for the car of machines, with the understanding that we were not to have any other opposition. Now we are not going to offer another one of these machines for sale. Mr. Massey made a false statement to sell these machines, and we do not propose to do any such business. The machines are here subject to your order. Mr. Massey also said that the freight would not be but 77½ cents on the machine, and when they came the freight was over $1. We paid the freight and thought we would fix this with Mr. Massey, but

when he came, he said that I would have to take the matter up with you. Please advise what disposition you wish made of these machines.

"I. W. BULLOCK & CO.

"I received the following letter, dated 15 November, 1910, from the plaintiff, and marked Exhibit B:

"MESSRS. I. W. BULLOCK & CO.,

"Creedmoor, N. C.

"GENTLEMEN:—We have your esteemed favor of the 11th, which is carefully read, and in simple fairness to the situation, we state that since our relations with your company were negotiated, we have made no shipments to Mr. Kittrell, of Oxford, which, it seems to us, should meet and satisfy your contentions in this respect. You were aware that we had formerly dealt with Mr. Kittrell.

"Your statement that Mr. N. L. Massey had made certain promises is of a character that we must necessarily place the same before him, and we are obliged to say that accepting your written and signed order,
(5) the terms of which are plainly specified, we cannot accept your suggestion that your machines are now subject to our order.

"What Mr. Massey said to you about the freight is the published rate of the transportation company, and we think admits of no correction, as the rate is 77½ cents per hundred pounds, and if you paid freight at a higher rate, refund can be obtained.

"We are not aware of any conditions attached to your order except as were embraced in the order itself, a copy of which is no doubt in your possession. In advising Mr. Massey of your present word, he will no doubt make it a point to see you at an early date, but in the absence of being able to do this, will write you at once, Yours truly.

"WHITE SEWING MACHINE COMPANY."

The machines arrived at Creedmoor on 22 October, 1910, and Bullock & Co., paid the freight, 26 October, 1910, amounting to $150.48. In deference to the suggestion of the court, the witness was not cross-examined.

A. J. Kittrell testified: "I know Mr. N. L. Massey; I purchased of him, the latter part of September, 1910, I think 28 September, a car-load of White sewing machines. I first bought 40 and then bought 60 machines. I received them in October, 1910. The only contract I had was a verbal one with Mr. Massey, and he agreed that I was to have Granville County, and he would reserve Person County for me. Mr. Massey came to Oxford in a few days after I received the machines, which I bought of him in September; he came to adjust the freight rate. On 12 October, 1910, I had on hand 106 White sewing machines. I was selling them in Granville County, and no notice was ever given me that my agency was to ter-

minate." In deference to a suggestion of the judge, this witness was not cross-examined.

At the close of the defendant's case, the court held that there was not sufficient evidence to go to the jury on the first issue offered by the defendants, and his Honor then declined to submit any of the issues tendered by them. The jury returned a verdict in favor of the plaintiff for $3,900 and interest from 24 April, 1911, under the instructions (6) of the court. Exceptions were duly taken to the several rulings of the court.

It is said that the representations were promissory. Not at all, as we view them. Bullock & Co. were told by the plaintiff's agent that they would not be brought into competition with Kittrell, and for the reason, as he represented to them, that Kittrell was no longer the agent of plaintiffs for the sale of their sewing machines, and that he had only two or three machines on hand. This was no promise that he should not compete with him, but the false statement of existing facts, calculated to deceive, intended to deceive, and which did deceive the defendants as the jury might well have found upon the evidence, if it had been submitted to them. It is evident that defendants would not have bought if Kittrell would continue to sell, and in order to relieve their apprehension on that score, the agent falsely stated, if we are to believe Bullock and Kittrell, the following as the subsisting facts: That Kittrell had only two or three machines, when he had six, and had ordered from plaintiffs 100 more in the latter days of September, which arrived in Oxford at the very time the agent was making his false representations in Creedmoor. Can it be said that a statement that Kittrell had only three machines was not false, when the agent knew that he had taken an order from him for 100, delivered at the time he sold the machines to defendants? And if it was false, it surely was not promissory. If it was not a false affirmation, as I think it clearly was, it was, at least, the suggestion of a falsehood, or the suppression of the truth, which in law would be the same thing. But he told defendants they would have no competition with Kittrell, when he knew, at the time, as Kittrell testified, that plaintiffs had made a contract with Kittrell, through him as their agent, to the effect that Kittrell should have the exclusive agency for Granville County, and he was told that they would also reserve the adjoining county of Person for him, which would, of course, bring the defendants in direct competition with Kittrell. They not only had given Kittrell the agency for Granville, with a promise of Person, but had supplied him with 100 machines to start with. Upon far less evidence than this we have sent cases of this kind to the jury. Were the representations calculated to deceive? (7) Why did the defendant inquire about Kittrell at all, if he was not seeking information upon which he expected to base his decision as to

the purchase? And the agent knew that the inquiry was for that purpose, or it is a clear inference from the testimony, which the jury could have drawn. In response to it, he said that Kittrell had been handling their machines, but would not handle them any longer; that he was not going to sell any more machines to him and he then had only two or three, when he must have known this to be false, as he just sold him 100. The knowledge of this fact he manifestly intended to withhold from defendants, in order to secure the contract. That all this induced defendants to buy must be taken as true, as Bullock expressly testified that it did, and we are dealing with something equivalent to a nonsuit, *i. e.*, a charge that defendants could not, upon the evidence, have the contract rescinded, nor could they recover damages for the fraud alleged to have been practiced upon them. All the evidence must be taken as true. *Deppe v. R. R.*, 152 N. C., 79, and cases cited. "Where a vendor in a sale or exchange of real or personal property makes false representations as to material facts relating to the property, having at the time knowledge that his statements are false, or what the law regards as equivalent to such knowledge, and intending that the purchaser shall rely upon them as an inducement to the purchase, he becomes liable to an action of deceit in case the purchaser, acting in reliance upon the representations, consummates the purchase and suffers loss thereby." 20 Cyc., 45. The false representation is material, as is held in *Fishblate v. Fidelity Co.*, 140 N. C., 593, if the fact untruly asserted or wrongfully suppressed, if it has been known to the party, would have influenced his judgment or decision in making the contract at all. "Fraud is material to a contract when the latter would not have been made if the fraud had not been committed." *McAleer v. Horsey,* 35 Md., 439. "To sustain an action for deceit for a false and fraudulent representation as to the value of property, whereby the plaintiff was induced to purchase the same, it is not necessary that the plaintiff should have relied solely on the representation made; it is enough that it had material influence in inducing him to purchase." *Handy v. Waldron,* 19 R. I., 618, and in the last cited case it was also held that whether the buyer is chargeable with negligence or laches in not making inquiry, although he had the opportunity to do so, was a question for the jury.

(8)

But it is argued that it was the duty of Bullock to investigate—that is, to doubt the agent's veracity and ascertain the facts for himself. In the first place, the contract was signed immediately after the representation was made, and he had no time to do so. Besides, the agent had knowledge of the fact; the very nature of the transaction shows it, as he had sold the machines to Kittrell. The defendant innocently relied on his integrity. We have said in several cases that a man is not expected to deal with another as if he is a knave, and certainly not unless there is something

to excite his suspicion. Defendant had the right to suppose that the statement was true, as the agent had knowledge of the fact, and he did not. "If the fact represented is one which is susceptible of accurate knowledge, and the speaker is or may well be presumed to be cognizant thereof, while the other party is ignorant, and the statement is a positive assertion containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied on. And if in such a case plaintiff has been defrauded through the acting in reliance on defendant's false statements, defendant will not be heard to say that he is a person unworthy of belief and that plaintiff ought not to have trusted him, or that plaintiff was negligent and was cheated through his own credulity." 20 Cyc., 33, 34. It is said in *Foley v. Haltry,* 43 Neb., 133, that "A person is justified in relying on a representation made to him where it is a positive statement of fact, and where an investigation would be required to discover the truth." The statement in our case was that Kittrell had only three machines, when the agent knew that he had 106; and further, that he would no longer handle their machines, when he held the unrevoked agency for Granville County.

We find this in *Cottrell v. Krum,* 100 Mo., 399: "It is no excuse for, nor does it lie in the mouth of the defendant to aver (9) that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying: 'You trusted me; therefore, I had the right to betray you.' The same idea is expressed in another opinion thus: 'We doubt if it is equity to allow a sharper to insist on the fulfillment of his bargain, on the ground that his victim was so destitute of sagacity as to make no further inquiries,'" citing *Pomeroy v. Benton,* 57 Mo., 531; *Wannell v. Kem,* 57 Mo., 478. No man can complain that another has relied too implicity on the truth of what he himself stated (Kerr on Fraud, p. 81), for it is not just that a man who has intentionally deceived another should be permitted to say to him, "You ought not to have trusted me, and you were yourself guilty of negligence," when he had special knowledge of the facts of which he knew the other to be ignorant. Bigelow on Fraud, p. 523 *et seq.* "We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood." *Hale v. Philbrick.* 42 Iowa, 81. "The very representations relied upon many have caused the party to desist from inquiry and neglect his means of information; and it does not rest with him who made them to

say that their falsity might be ascertained, and it was wrong to credit them. To this principle many authorities might be cited." *Graham v. Thompson,* 55 Ark. 299. "A person cannot procure a contract in his favor by fraud, and then bar a defense to suit on it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him." *Warder v. Whitich,* 77 Wis., 430. "However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated." *Reynell v. Sprye,* 1 De. Gex, M. and G., 549. These cases are approved in *Strand v. Griffith,* 97
(10) Fed., 854, which is a very instructive one. But a case very much in point is *Eaton v. Winnie,* 20 Mich., 156, and there it is said: "Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false statements regarding it, upon which the other relies, to his injury, the party who makes such statement will not be heard to say that the person who took his word and relied upon it was guilty of such negligence as to be precluded from recovering compensation for injuries which were inflicted on him under cover of the falsehood." But the law is settled in this State by *Griffin v. Lumber Co.,* 140 N. C., 514, where it is held, approving what is said in Pollock on Torts, 293: "It seems plausible, at first sight, to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied on them. He must show that his representation was not in fact relied upon. . . . In short, nothing will excuse a culpable misrepresentation, short of proof that it was not relied on, either because the other party knew the truth or because he relied wholly on his own investigatioin or because the alleged facts did not influence his action at all. And the burden of proof is on the person who has been proven guilty of material misrepresentation." And in *Hill v. Brewer,* 76 N. C., 124, *Justice Bynum* said that "The maxim of *caveat emptor* does not apply in cases where there is actual fraud."

The agent told defendant, it is true, that Kittrell had been selling plaintiff's machines; but the fraud consisted in the further statement that he had ceased doing so. It does not lie in the mouth of the plaintiffs, nor is it becoming or seemly in them, to say that defendants should have immediately suspected their agent of being a dishonest man and made inquiry to verify his statement before signing the contract, even if there

had been time and opportunity to do so. Whether Bullock & Co. exercised due diligence, if required to investigate under the circumstances of this case, was a question for the jury. 20 Cyc., pp. 50, 51. The principle relied on by the plaintiff, that if the means of knowl- (11) edge be at hand and equally available to both parties, and there be no fiduciary relation and no warranty of the truth of the statement, the party complaining must show that he has made due inquiry, is subject to much qualification, as will be seen by reference to 20 Cyc., pp. 32, 33, and does not apply where there is actual intentional fraud or misleading statements, which are calculated to prevent or stifle inquiry, and made under such circumstances as those in this case, where they were of a nature to allay suspicion. The authorities cited by the plaintiff were based upon a state of facts entirely different from those in this case, and such are the cases of *Slaughter v. Gerson,* 13 Wall., 379, and *Champion v. Woods,* 79 Cal., 17.

There was nothing in this transaction to put a man of ordinary prudence upon inquiry. Bullock knew that the agent was cognizant of the facts, and relied upon his positive and unequivocal statements. There was absolutely nothing to arouse his suspicion or to induce him to believe that he was not an honest man and would not tell the truth.

It is further said that the defendant should have acted promptly in discovering the fraud and repudiating the contract. He did so, as we think the evidence conclusively shows. It must be remembered that the contract upon which this action was brought was signed by defendants at the very time of the false representations. So there was no opportunity then to investigate, if it was required by the law, which we have shown is not the case. The machines were received on 22 October, and defendant could not have ascertained the truth until, by selling them, he came into actual competition with Kittrell; and, regardless of this fact, he complained to plaintiff of the fraud on 11 November, just eighteen days after he could possibly have sold any of the machines. No court, we think, has ever imputed laches under such circumstances, certainly not as matter of law. On the contrary, defendants acted with unusual promptness, and offered to return the goods. But the question whether they acted as an ordinarily prudent man would have done was to be decided by the jury, as we have seen. There is no evidence as to how many machines they had sold before they notified plaintiffs of the fraud, (12) but they could have been selling, if they sold at all, only a few days. As they offered to return all the machines, it would seem that they had not sold any of them, and had merely made preparations to sell. But we repeat, all this was for the jury. When the plaintiffs were notified of the facts, they repeated the imposition and the fraud by stating

that they had made no shipments to Kittrell since their agent's false representations were made, which, perhaps, was literally or nominally true, but it was an evasion of the truth, as they had a few days before sold 100 machines to him, which, of course, would make him a competitor of defendants, and besides, had given him the agency for Granville County. They thought that their agent's representations were of a very serious character, as they said so, and promised "to place the same before him" at once. After learning of the fraud, they seek to intrench themselves behind the clause in the contract exempting them from liability for any representations of their agents at variance with the contract, which, of course, does not protect them, for if the contract is void by reason of the fraud, this clause falls with it. *Machine v. Feezer,* 152 N. C., 516; *Garrison v. Machine Co.,* 159 N. C., 285.

We said in *Garrison v. Machine Co.,* 159 N. C., 285, that the clause of the contract excluding parol evidence of declarations made by the agent of defendant in that case did not apply, nor did the rule of law forbidding the terms of a written contract to be contradicted or varied by oral proof. "This is not an action for the breach of a written contract; but the theory upon which it rests is that the instrument was never delivered, and this is the principal question in the case. If the contract had been executed, or the writing delivered to the agents, with the understanding that it should presently take effect, the plaintiff could not by parol evidence contradict or vary its terms (the execution and validity of the contract not being questioned). *Moffitt v. Maness,* 102 N. C., 457. But this is not what was proposed to be done; but on the contrary, the purpose was to show that the contract never had any existence in fact.

(13) The case is governed in all its features by *Pratt v. Chaffin,* 136 N. C., 350, and *Bowser v. Tarry,* 156 N. C., 35." The clause of exemption is only operative when the contract is a valid one. *Machine Co., v. McClamrock,* 152 N. C., 405; *Medicine Co. v. Mizell,* 148 N. C., 384; *Unitype Co. v. Ashcraft,* 155 N. C., 63.

This transaction was not mere dealer's talk or the puffing of his wares, nor were the representations promissory. The agent stated facts as subsisting, viz., that defendant would not come into competition with Kittrell, who had only three machines. If the evidence is to be credited, this was false and was intended to deceive in order to secure the contract. But even promissory representations may be false and fraudlent, and if so, they invalidate the contract, and as much so as if they had been simply and technically representations of existing facts. "As a general rule, false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such promises are subsequently broken, unless the promise includes a

misrepresentation of existing facts or the statement is as to some matter peculiarly within the speaker's knowledge, and he makes the statement as a fact." 20 Cyc. p. 20. Again: "As a general rule, if a vendor of property, in order to induce a sale, makes positive assertions as to any material fact which is peculiarly within his own knowledge, and of which the purchaser is ignorant, they may be relied on by the purchaser without further investigation; and if the statements are false and fraudulent and cause damage to the purchaser, he may hold the vendor liable in damages. Nor need the fact be one exclusively within the vendor's knowledge. Upon this principle positive misrepresentations by a vendor of territorial rights under patents, as to the merits and value of the patents and of the rights to be sold, are held not to fall within the rule of *caveat emptor.*" 20 Cyc., pp. 55, 56, and note 43. This sounds very much like the words uttered by the agent and set out in this case, and has the true ring of a very just and preëminently honest principle of morals, and of law, which should be founded on morality. And again: "Although the purchaser may have available means of ascertaining the truth, yet if the vendor by any misrepresentation or by (14) any trick or artifice induces him to forbear inquiry or investigation which he would otherwise make, and thus to rely solely on the vendor's false statement, the rule of *caveat emptor* does not apply, and the purchaser may hold the vendor liable. And since such practices are obviously calculated only to mislead the purchaser by producing an erroneous impression on his mind and thus lulling him into a false security, they may of themselves well be deemed to amount to actionable fraud where they succeed in producing the desired result." 20 Cyc., 61, 62. This also seems to bear a very close likeness to the facts of our case, and to have adjusted a fair and wholesome legal principle to them.

If the contract was induced by fraud, defendants had the right to rescind it and return the goods, which they did. *Food Co. v. Elliott,* 151 N. C., 339; *Machine Co. v. Feezer,* 152 N. C., 516; *Fields v. Brown,* 160 N. C., 295.

The case of *Unitype Co. v. Ashcraft, supra.* discusses several of the questions involved in this case, and is an authority in support of our conclusion.

The result is that the issues in the case should be submitted to the jury, with proper instructions upon the law, and it was error not to have done so and to have entered a verdict and judgment for the plaintiff. The case has been considered by us upon the assumption that the jury would have believed the witnesses, Bullock and Kittrell. It may be that the plaintiff could have overcome their testimony, if the case had been referred to a jury. There must be another trial of the case, because of the error in the ruling of the court, as indicated above.

New trial.

BROWN, J. dissenting: The defendant admits the contract sued upon and the amount of the indebtedness, but alleges that the execution of the contract was procured by the fradulent and false representations of the plaintiff's agent, Massey. His Honor held that there was no sufficient evidence to support the defendant's plea. In this ruling I concur, as I am of opinion that the evidence of fraud is entirely
(15) too shadowy.

The defendant Bullock testified that the agent Massey said that there was a large territory in this and the adjoining counties that machines could be handled in; that he asked Massey if Kittrell of Oxford had not been handling these machines. Massey said that Kittrell had been handing them, but he was not going to handle them any longer; and that he did not intend to sell any more machines to Kittrell; that Kittrell had only two or three machines on hand.

The witness testified that in consequence of this conversation, he signed the order for the machines and that they were shipped to him from Cleveland; that he put his men to selling them, and finding out that Kittrell was selling the same machine, he stopped his men and notified the plaintiff that the machines were subject to their order.

The only real misstatement that I can see is in reference to the number of machines Kittrell had on hand. Massey stated he had two or three. It turned out afterwards that Kittrell had on hand fifty or sixty. There is nothing to show that Massey made an intentional false statement.

The agency of Kittrell was not continued, as the correspondence shows, and the fact that Kittrell had more machines than had been stated by plaintiff was scarcely a determining factor in the defendant's decision. In so large a territory fifty additional machines would make but little difference.

It is in evidence that Creedmoor, when the plaintiffs did business, is only 18 miles from Oxford, where Kittrell was established, and that the two places were connected by daily mail, telephone, and telegraph.

I am of opinion that the representations relied upon to establish fraud do not come up to the general definition of a misrepresentation of a subsisting fact. *Hill v. Gettys*, 135 N. C., 375. They appear to me to be "promissory representations," looking to the future, and to be entirely void of any fraudulent purpose.

The circumstances surrounding the parties were such that the plaintiffs had every opportunity to make inquiry at any moment of Kittrell,
(16) as to his future intentions in regard to handling the machines, as well as to the number which he had on hand.

It is a general principle that if the means of knowledge be at hand and equally available to both parties, and the subject-matter be open to inquiry of both alike, and there be no fiduciary relation, and no warranty

of the facts, the party complaining must show that he has availed himself of the existing means of information at the time of the transaction. *Greenleaf v. Gerald,* 94 Me., 91. If the circumstances attending the transaction are such as would put a reasonable person on inquiry, the law will not presume deceit. *Champion v. Woods,* 79 Cal., 17.

As is said by *Mr. Justice Field* in *Slaughter v. Gerson,* 13 Wallace, 379:

"Where the means of knowledge are at hand and equally available to both parties, if the purchaser does not avail himself of these means, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, we will not see matters directly before them where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and been misled by overconfidence in the statements of another. The reason for this doctrine is based upon the ground that public policy requires people to exercise at least ordinary prudence in their business dealings instead of calling on the courts to relieve them from the consequences of their inattention and negligence."

To rescind the contract for fraud in procuring it, this Court has said that the injured party must act promptly and within reasonable time after he should have discovered the fraud by due diligence, and he is not allowed to rescind in part and affirm in part. *May v. Loomis,* 140 N. C., 352.

The vendee is not permitted to be culpably negligent in cases where he ought to have informed himself of the facts, and to fall back upon an alleged reliance upon the vendor's representations. *Ramsey v. Wallace,* 100 N. C., 82; 14 A. and E., 117.

In addition to the fact that the representations in this case are largely of a promissory character (*Cash Register v. Townsend,* 137 N. C., 655), it appears to be undisputed that the plaintiff had every (17) opportunity to make inquiry of Kittrell, and that he delayed a most unreasonable time. He signed the order, sent it to Cleveland, O., received the machines after they were shipped to him, put his men on the road to sell them, and sold a number of them without making any inquiry whatever of Kittrell.

As he had every opportunity to inform himself in advance, without any sort of inconvenience or delay, it was the defendant's negligence that he failed to do so.

MR. JUSTICE ALLEN concurs in this opinion.

Cited: *Machine Co. v. McKay, post,* 587, 591; *Williams v. Dunn,* 163 N. C., 221; *Pate v. Blades, ib.,* 273; *Machine Co. v. Bullock, ib.,* 547.

M. E. CONDER ET ALS. v. M. T. STALLINGS ET ALS.

(Filed 11 December, 1912.)

Pleadings—Verification Sufficient—Issues—Burden of Proof.

In this action for specific performance of a bond for title to lands, there is uncontroverted allegation in the answer that the bond had been used in a former trial, had disappeared from among the papers and after diligent search cannot be found, with a further averment that a part of the *locus in quo* was not embraced in the bond, "according to the best recollection and belief" of the defendant, the answer being duly verified: *Held*, that the form of the denial is sufficient which bases the denial upon the defendant's recollection, which is his own information, and that the issue raised was a material one, with the burden of proof on the plaintiff.

APPEAL by defendants from *Justice, J.*, at August Term, 1912, of UNION.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

J. F. Newell, Adams & Armfield, and Stack & Parker for plaintiffs.
Lemmond & Vann and Redwine & Sikes for defendants.

CLARK, C. J. This was an action for specific performance. Paragraph 3 of the complaint alleges that on 7 January, 1901, the defendant Stallings and wife executed to Martha A. Conder a bond for
(18) title, embracing six tracts of land described by metes and bounds, and the said Martha Ann was at that time a married woman and remained such till her death, 12 March, 1908. The answer admits that the defendant M. T. Stallings executed a bond for title at that date, but avers that the contract therefor was made with M. E. Conder and not with Martha Ann, and that at the instance of M. E. Conder the bond for title when drawn was made to Martha Ann as a protection against his creditors, and that she never had any interest in said lands. The defendant further avers that "according to his best recollection and belief" said bond for title did not contain the 7-acre tract of land nor the 79-acre tract of land, which are the subject-matter of this action.

The defendant M. T. Stallings also pleaded an estoppel that in a former action over the other four tracts claimed to be in said bond for title, in which action he was plaintiff and these plaintiffs were defendants, he offered the bond to make title (which has since been lost) as an estoppel against these plaintiffs (then defendants), and these plaintiffs (then defendants) denied in their pleadings and by their evidence in the cause that such bond had ever been made to Martha Ann Conder or delivered to her, and M. E. Conder, one of the plaintiffs in this action (then a

defendant), testified under oath to that effect, and thereby this defendant (then plaintiff) was defeated of a recovery.

The court held (1) that there was no sufficient denial of paragraph 3 of the complaint; (2) that plaintiffs were not estopped by the pleadings and judgment in a former case, and (3) refused to submit issues, and referred the case to take an account. To these rulings the defendants excepted.

It appears in the answer and is not controverted that the bond for title, which had been used in a former trial, has disappeared from among the papers in said cause, and after diligent search cannot be found. The answer of the defendant M. T. Stallings, therefore, denying that it embraced these two tracts of land, "according to his best recol- (19) lection and belief," is a sufficient compliance with Revisal, 479. Why use the formula, denying "any knowledge or information sufficient to form a belief," when the defendant has a belief and bases it upon his recollection, which is his own information? The answer is duly verified as required by Revisal, 479. It was a most material matter on this inquiry whether the bond for title embraced these two tracts of land or not. The defendant Stallings avers as explicitly as he can do as to a lost bond, that it did not embrace the two tracts now sued for. This made it incumbent upon the plaintiff to establish that fact, and it was error not to submit that issue to the jury.

Without going into the question, at present, whether the proceedings in the former cause were an estoppel upon the plaintiffs in this, especially in view of the fact that the issue of fact must be determined whether or not the bond for title in the former suit embraced these two tracts or not, there are other allegations in the answer tending to show an estoppel *in pais*.

There must be a new trial, in which proper issues covering the disputed issues of fact shall be submitted to the jury.

Reversed.

CANNON MANUFACTURING COMPANY v. EMPLOYERS' INDEMNITY COMPANY.

(Filed 4 December, 1912.)

1. Insurance, Indemnity—Policy Contracts—Limited Liability—Judgments—Interest—Appeal and Error.

A policy indemnifying an employer against loss for injuries received by his employees, limiting the insurer's liability in a certain sum for an injury caused to one person, containing a provision excluding the insured's interference with a settlement or the defense of an action

brought by the employee, and requiring that no action shall lie against the insurer "respecting any loss or expense under this policy unless it shall be brought by the assured himself," does not exclude the insurer's liability for interest on a final judgment rendered against the insured, though with the interest added, the amount of recovery exceeds that limited specifically in the policy.

2. Money Judgments—Appeal and Error—Affirmance—Final Judgments—Interest.

An appeal from a money judgment rendered in the Superior Court does not vacate the judgment, but only operates as a *cessat executio*, and when this judgment is affirmed on appeal, it becomes the final judgment of the court, bearing interest from its date.

(20) APPEAL by defendant from *Justice, J.*, at September Term, 1912, of MECKLENBURG.

Controversy without action, heard by *Justice, J.*, at September Term, 1912, of MECKLENBURG. His Honor rendered judgment against defendant, and it appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Tillett & Guthrie for plaintiff.
Davis & Davis for defendant.

BROWN, J. The defendant issued to plaintiff an employers' indemnity policy of the usual kind, contracting that in the event one of plaintiff's employees should bring a suit against the plaintiff for damages sustained by the alleged negligence of the plaintiff, the defendant would "at its own cost defend against such proceeding in the name of and on behalf of the assured, or settle the same," and providing also that the defendant's liability on account of injury to any one person should not exceed $5,000, and providing further that the assured should not settle the claim or incur any expense or interfere in any negotiations for a settlement or in any legal proceedings without the consent of the indemnity company.

At April Term, 1911, Ola Walker, administratrix of Odell Walker, obtained judgment against plaintiff for $4,951.40 and $121.73 costs. The case was appealed to this Court by the indemnity company and no error found and a new trial refused. 157 N. C., 133.

(21) The only question presented on this appeal is the liability of defendant indemnity company for interest on the judgment from date of its rendition by the Superior Court.

The defendant insists it is not liable in excess of $5,000 and costs. The plaintiff paid the final judgment after a new trial was refused by this Court, the total sum being $5,363.62.

In the policy we find this clause:

"6. No action shall lie against the company respecting any loss or expense under this policy, unless it shall be brought by the assured himself to reimburse him for loss or expense actually sustained and paid in money by him in satisfaction of a final judgment against him."

We are of opinion that under this clause the defendant is bound to reimburse plaintiff the full amount paid out on the final judgment in the *Walker case,* inasmuch as the judgment when rendered did not exceed $5,000 and costs.

The courts of this country have been divided upon this question.

1. One class of decisions holds that the indemnity company is liable for interest, although it is in excess of the limit fixed in the policy.

2. Another class of decisions holds that the indemnity company is liable for interest from the rendition of the final judgment by the Supreme Court.

3. The third class of decisions holds that on account of the express terms of the contract limiting the amount to $5,000, the indemnity company is not liable for any interest if it carries the amount in excess of the limit fixed by the policy.

Under the first class of decisions are *Paper Co. v. Casualty Co.*, 92 Me., 574, and *Cudahy Packing Co. v. New Amsterdam Co.*, 132 Fed., 623. Both of these hold that the indemnity company is liable for interest from the time of the rendition of the judgment, although the interest carries the amount in excess of the limit in the policy.

We candidly admit that the third class of decisions is largely in the majority. They all base their judgments upon the ground that it is "so nominated in the bond." We think the reasoning supporting those cases is technical and at variance with the purpose and meaning (22) of the bond as well as elementary principles of justice.

In effecting such insurance the plaintiff was not purchasing a lawsuit, but indemnity. While it is provided that the defendant should have control of the litigation, it clearly was not contemplated that after judgment rendered the litigation should be indefinitely protracted by defendant at plaintiff's expense.

In one of the opinions of the third class we find the learned judge admits the injustice of his conclusion in these words: "While it seems inequitable to compel the plaintiff to pay the interest on the judgment accruing while the defendant was engaged in an ineffectual attempt to relieve itself from liability, the answer to it is that the parties otherwise agreed." *Trap Rock Co. v. Insurance Co.*, 128 N. Y. Supp., 822.

In that case we find a very strong dissenting opinion, from which we may with profit quote at length:

"We need not go into an extended discussion of the various provisions

of the policy in question. We find in it a separate independent clause, providing what the rights and liabilities shall be in case the assured is sued on account of an accident. The policy provides that the assured shall not settle or litigate, but must turn the summons over to the insurer, which at its own cost will defend against the suit, or settle the same. The words 'at its own cost' attach themselves as much to the words 'or settle the same' as to the words 'defend against the suit,' so that we have the absolute agreement of the company to defend against any suit at its own cost, or to settle the suit at its own cost.

"An insurer does not at its own cost defend against a suit merely by employing lawyers, procuring the attendance of witnesses, and then leaving the assured to pay the judgment which may follow and leaving it to another action against the insurer for reimbursement. When the company agreed to defend against a suit or settle the same at its own cost, the agreement is broken if the assured is compelled to pay the judgment. The language in question casts the duty of payment upon the insurer, and after the summons is delivered to it, it assumes all responsibility with reference to the suit, with the sole proviso that the limit of
(23) its liability on account of the damages to one person shall not exceed $5,000.

"The damages were liquidated in this case at just $5,000, and, therefore, as between these parties, the plaintiff was absolved from all responsibility with reference to the lawsuit or judgment. It was between them virtually a judgment against this defendant.

"When the judgment was recovered it merged the original cause of action, and the liability thereafter rested upon the judgment itself and not upon the cause of action upon which it was founded. The interest in question is awarded by law as damages for nonpayment of money when due. *Steiner v. Fourth Presbyterian Church,* 17 App. Div., 500, 45 N. Y. Supp., 524.

"It would, therefore, be unjust to charge upon the plaintiff the damages which the law has imposed on account of the delay and the neglect of the defendant. The interest in question does not represent any liability on account of or for the accident or the policy, but is a liability imposed by law for the delay of the defendant in paying the judgment which, as between the parties, it was legally obligated to pay. The interest, therefore, is the obligation of the defendant, and not of the plaintiff, and the plaintiff having been compelled to pay the same, is entitled to recover it without reference to the terms of the policy, other than that the judgment was to be paid by the defendant."

We think the decisions of the second class really are in accord with our views. They hold that the indemnity company is liable for interest from the time of the rendition of a final judgment by the appellate court.

Under our judicial system, this Court rarely ever enters judgment. It keeps no judgment docket such as is kept in the Superior Court, and issues no execution for money except for its own costs. The final judgment is rendered by the Superior Court, and while an appeal may be taken to review it and the trial which ended in it, yet the appeal does not vacate the judgment. It stands as the final judgment until set aside by this Court, and the bond given on appeal only operates as a *cessat executio.*

In the *Walker case* we rendered no technical judgment, but (24) delivered an opinion finding "no error" on the trial in the lower court, and thereby affirmed the judgment of that court. The interest on that judgment from the date when rendered is an incident attaching to the judgment by operation of law as a penalty for delay in payment. This is the view taken by this Court in *Stafford v. Jones,* 91 N. C., 189, a case in point.

In this case it is said: "Where a mortgage is made to indemnify one against loss by reason of becoming surety upon a note executed to negotiate a loan to carry on business, and the mortgagor makes default: *Held,* that while a provision in the deed rendering the property liable for 'no more than $5,000,' is a limitation upon any increase of the debt, yet interest is recoverable as an incident to the debt.

"Any interest due on it, if not paid, was incident to and part of it. If Steele had paid the debt at maturity, he would have been entitled to interest upon the money so paid by him until he should be repaid. Why, then, should he not be indemnified for the incidental part of the debt as well as the debt itself? The nature of the transaction suggests that the indemnity should extend to the interest. Apart from the stipulations in the agreement, in the order of such things, the indemnity would extend to the interest, and taking the stipulations and qualifications in their spirit, they contemplate that it shall so extend."

The judgment of the Superior Court is

Affirmed.

(25)

J. H. GREEN ET AL. v. A. MILLER AND W. J. BULLOCK.

(Filed 20 November, 1912.)

1. Cities and Towns—Streets and Sidewalks—Plats and Maps—Innocent Purchasers—Notice.

When the owner of lands in a city or town has them platted into lots, streets, alleys, etc., and sells the lots with reference to the streets, alleys, etc., according to a map made for the purpose, he thereby dedicates the streets and alleys to the use of the purchasers of the lots, who

acquire their title with notice thereof, express or implied; and, under certain circumstances, it is a dedication to the public.

2. Same—Mandatory Injunction.

Under conflicting evidence as to whether the purchaser of a lot of land in a tract which had been platted and mapped by the original owner had notice of a street appearing on the map, which he had obstructed, the jury having found in the negative, it is reversible error for the trial judge to grant a mandatory injunction compelling the defendant to desist from obstructing the street, and his judgment will be reversed on appeal.

3. Cities and Towns—Streets and Sidewalks—Plats and Maps—Dedication—Innocent Purchasers—Equity—Estoppel—Notice.

The equitable doctrine which will estop the owner of lands from denying his dedication of streets platted therein, is predicated upon the idea of bad faith in him, or those claiming under him, with knowledge of the facts, or notice thereof, expressed or implied, and has no binding effect upon innocent purchasers for value of the lots upon these streets without notice, actual or constructive, of the easement, or of the rights of others therein.

4. Cities and Towns—Streets and Sidewalks—Plats and Maps—Dedication—Innocent Purchasers—Notice—Issues—Procedure—Appeal and Error.

In an action for a mandatory injunction for the removal of an alleged obstruction in a street which had been platted off in lands, with others, by the original owner, the verdict of the jury established the facts that the land had been thus divided into streets and lots sold to various purchasers, and by answer to the seventh issue, under conflicting evidence, not objected to, that the defendant was a purchaser of the *locus in quo* without notice: *Held*, the verdict was controlling, and the judge of the lower court was in error in granting the injunction, thus disregarding the legal effect of the seventh issue; and even should he have thought that the defendant purchased with constructive or legal notice, the practice is that he should have set the verdict aside, and given the defendant the power of reviewing his action on appeal.

5. Cities and Towns—Streets and Sidewalks—Condemnation—Obstructions—Mandatory Injunction—Ejectment.

The remedy of an incorporated city and town requiring the lands of private owners for the purposes of laying off streets, is by condemnation proceedings; and whether a mandatory injunction may be granted to have an obstruction in its streets removed, in proper instances, or whether an action of ejectment would lie, *Quære.*

(26) APPEAL by defendants from *Webb, J.*, at May Term, 1912, of BEAUFORT.

This action was brought by J. H. Green, town of Belhaven, Mary A. Woodard, A. W. Carty, and others, against the defendants A. Miller and W. J. Bullock, and the relief sought is a mandatory injunction compelling the defendants to desist from obstructing any part of Pungo Street which

lies within the corporate limits of Belhaven, and to remove therefrom certain buildings or stables now occupied by the defendant A. Miller. The jury returned the following verdict:

1. Was the defendant Bullock, in 1890, the owner in fee of that tract of land in what is now known as Belhaven, bounded on the north by Pantego Street, on the east by Pamlico Street, on the south by Clark or Front Street, and on the west by Allen or Union Street? Answer: Yes.

2. Did the defendant Bullock cause this land or any part of it to be surveyed and platted into lots and streets? Answer: Yes.

3. If so, did the defendant Bullock sell lots in this tract with reference to said plat or survey? Answer: Yes.

4. If this tract or any part of it was surveyed and platted into lots and streets, did one of the streets so surveyed and platted correspond with what is now known as Pungo Street? Answer: Yes.

5. If what is known as Pungo Street was surveyed and platted out, what width was given it in the survey and plat? 80 feet. And did it extend from Pamlico to Allen Street? Answer: Yes.

6. Is there any obstruction in that lot of land covered by Pungo Street? Yes. And if so, who maintains it? Answer: A. Miller.

7. Did the defendant Miller have notice, at the time he purchased the land covered by the deed introduced in this action, that any part of it was covered by Pungo Street or any street? Answer: No.

Plaintiffs alleged that W. J. Bullock, being the owner of certain land now embraced within the limits of the town of Belhaven, caused the same to be surveyed and laid off into lots and streets, and that the surveyor, at Bullock's request, made a map or plan thereof, and (27) the plaintiffs, other than the town of Belhaven, bought several of the lots from him, according to the said plan or map, some of them being represented on the map as bounded on Pungo Street. That one of the streets was designated on the map and in the plan as Pungo Street, and that the lots were sold to the plaintiffs, other than the town of Belhaven, and described as fronting on Pungo Street, which is the third street north of Pungo River, the two intervening streets being Clark and Main. Pungo Street runs east and west, crossing Pamlico Street, and extends to Allen Street and as far west as Haslin Street. This is what we gather from the allegations, the map, and the evidence, and if not precisely accurate, is sufficiently so for all practical purposes. The counsel did not agree as to the correctness of the map, and Pungo Street, as claimed by the plaintiffs, may extend north, instead of west. There is an allegation in the complaint that the town of Belhaven had accepted the dedication of Pungo Street, and that it had become one of the public streets or thoroughfares of the town. The plaintiffs further allege that Bullock sold to L. G. Roper, and he to the defendant Miller, a parcel of

land, west of Pamlico Street, which includes a part of Pungo Street, and that defendant Miller has erected in Pungo Street, west of Pamlico Street, a building which he now occupies and which obstructs the street and greatly interferes with the use thereof. The defendant A. Miller denies all the material allegations of the complaint, except the one that he had bought a part of the land from Roper. He specially avers that he purchased from Roper for full value, and if any plan or map of the land was made for Bullock, or any street by the name of Pungo had been dedicated to private or public use, or laid out for either of such uses, he had no notice thereof; nor did he have any notice that the land he bought embraced any part of what is well known and defined on the east side of Pamlico Street as Pungo Street, nor that there was any such street or any street at all extending across the place where he bought and erected the buildings. It was stated at the hearing in this Court, as we understood, and it so appears in the record, that none of the deeds referred to or called for the map, but that the lots described in
(28) several of them fronted on Pungo Street. It appears that the map was never seen by any purchaser of a lot from Bullock, except one J. P. Clark, who found it among his father's papers. Judgment was entered upon the verdict, and the defendants appealed.

John G. Tooley and Rodman & Rodman for plaintiffs.
Small, McLean & McMullan for defendants.

WALKER, J., after stating the facts: It is evident that this case must be decided upon the single question as to whether defendant was a *bona fide* purchaser for value and without notice of the facts alleged by the plaintiffs to constitute an equitable estoppel, which means that if he is bound thereby, he is concluded from now asserting that he is lawfully within the limits of Pungo Street, west of Pamlico Street, and cannot continue to maintain his stable or other structure. There was much controversy as to whether Pungo Street, west of Pamlico Street, if represented as such on the Bullock map, had ever actually been laid out, by such physical marks and boundaries as to constitute notice to the world that the land corresponding to that so designated on the map had been appropriated for a street and dedicated to the use of Bullock's grantees or to the public. Bullock himself testified that Pungo Street, west of Pamlico, "had not been surveyed nor opened up," nor did the surveyor plat all of the land. He further stated that "the surveyor might have surveyed east Pungo Street, that is, east of Pamlico Street, but he did not survey west of that street, and they did not open any street from Pamlico Street westwardly to Haslin Street." He still further testified that he employed Mr. Tripp to make the survey, who made

a plat for him, but did not plat it all. "It was more than the survey. I have never had the plat. The Clarks made the street themselves. Pamlico Street is the only street which has been left like I first cut them out. They have all been changed more or less. Parties built without knowing where the streets were. For instance, this man Pettiford, the husband of Josephine Pettiford." W. W. Walker testified that he bought the land where the stable is, from Dr. Bullock; but it seems that the deed was made by Dr. Bullock to L. G. Roper, who in turn sold and conveyed to the defendant A. Miller. The witness Walker, who (29) built the stable, stated that there was no street west of Pamlico, and nothing but a swamp. That the town of Belhaven had notified him, by its proper officers, and while he was setting the pillars, to desist from completing the stable until a committee could be appointed to condemn the street for the town. Afterwards, the committee reported, and the commissioners of the town accepted the report as to Pungo Street east of Pamlico, and rejected it as to the land lying west of that street, and authorized him to proceed with his work and finish the building, which he did. He listed the property for taxation and paid the taxes assessed against it. When he was building the stable there was no street there, but a street called Pungo was opened on the east side of Pamlico. This is only some of the testimony bearing upon the main question in the case. N. L. Sawyer testified: "I live in Washington, and lived in Belhaven thirteen years. I know where Miller's stables are. When I lived there it was nothing but swamp and subject to the ebb and flow of the tide. I know when Mr. Walker built. There was no sign of any street." There was much more testimony to the same effect.

With this evidence behind the verdict to sustain the finding of the jury upon the seventh issue, the court, without disturbing the verdict, in any respect, adjudged thereon that defendants remove the buildings from the street called Pungo, west of Pamlico, enjoined them from maintaining any kind of obstruction therein, and decreed that the street kept open and free from any impediments, for the use of the inhabitants of the town of Belhaven, without let or hindrance.

In this we are of the opinion there was error, and the judgment should have been the other way. Where the owner of real property lays out a town or village upon it, or even a plat of ground, and divides it into blocks or squares, and subdivides it into lots or sites for residences, which are intersected by streets, avenues, and alleys, and he sells and conveys any of the lots with reference to a plan or map made of the property, or where he sells or conveys according to a map of the city or town in which his land is so laid off, he thereby dedicates the streets and alleys to the use of those who purchase the lots, and also to the public, under certain circumstances not necessary to be now and here (30)

stated, and this is so unless it appears either by express statement in the conveyance or otherwise that the reference to or mention of the street or streets was solely for the purpose of description, and not intended as a dedication thereof. 13 Cyc., 455. The same rule is said to apply to such pieces or parcels of the land marked on the plat or map as squares, courts, or parks. The reason for the rule is that the grantor, by making such a conveyance of his property, induces the purchasers to believe that the streets and alleys, squares, courts, and parks will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land and selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created. 13 Cyc., 457, and notes. Many authorities sustain the principle, and the dedication, when once fully made, is held to be irrevocable. *Moose v. Carson,* 104 N. C., 431, and numerous authorities cited in the opinion of the Court by *Justice Avery,* and also at the end of the case in the annotated edition by the present *Chief Justice; Davis v. Morris,* 132 N. C., 436; *Hughes v. Clark,* 134 N. C., 460; *Milliken v. Denny,* 135 N. C., 22 (*S. c.,* 141 N. C., 227); *Hester v. Traction Co.,* 138 N. C., 293; *S. v. Fisher,* 117 N. C., 740; *Tise v. Whitaker,* 144 N. C., 514; *Collins v. Land Co.,* 128 N. C., 563; *Bailliere v. Shingle Co.,* 150 N. C., 627; and other authorities cited in the briefs of counsel in this case, to which access may be had by those wishing to pursue the investigation further.

But while the rule is well established, it is necessary that in some way notice of the dedication, thus made, be fixed upon those why may buy any part of the property which is subject to or charged with the easement, or of the rights of others flowing from the dedication. It would be unjust that a rule which is based upon an equitable doctrine should in its application, deprive a man of property bought in good faith, for value and without notice of the right to the easement. Parties who claim the benefit of the easement by virtue of the implied dedication can easily protect their rights and interest in it by having proper
(31) reference made to the map in their deeds, and if they fail to do so, it is their own fault, and they should not be permitted to visit its consequences upon an innocent purchaser who was misled by their laches. It is held that the original grantor, who sold by the map or the diagram of the land as laid out into blocks and lots, streets and avenues, and those claiming under him, are estopped to deny the right of prior purchasers of lots to an easement in the streets represented on the map, but it is not a strict estoppel, but one arising out of the conduct of the party who originally owned the land and platted it for the purpose of selling the lots, and is predicated upon the idea of bad faith in him, or those claiming under him, with knowledge of the facts, or with notice

thereof, either express or constructive, to repudiate his implied representation that the streets and alleys, parks and places, will be kept open and unobstructed for the use of those who may buy from him. So far as the owner is concerned, it would be fraudulent for him to contest the right of his grantees, but as to those who have bought without notice, actual or constructive, of the facts, and the equitable estoppel fastened upon him, the estoppel grounded, as we have said, in an equitable principle, completely fails. The same general principle of equity that raises the estoppel will protect him, as an innocent purchaser, from its operation; and this is but just and right. But we are not without direct authority upon this point, although the proposition seems to be somewhat new, or rather cases presenting it are rare, but it is, at last, but the application of a conceded rule of equity to the special facts of the case. One buys property of another without notice that some third person has a right to or interest in such property, and pays a full and fair price for the same at the time of such purchase or before he has notice of the claim or interest of such other in the property (5 Cyc., 719), takes the same free from the right of the other, because he is regarded as an innocent purchaser and entitled to the equitable consideration of the court. It is a perfectly just rule, and it would be strange if the law were otherwise.

It is said in 13 Cyc., pp. 492, 493, that, with the exception of (32) *bona fide* purchasers without notice, all parties holding under a dedicator take only his title. "The general rules as to the title taken by *bona fide* purchasers without notice apply where the encumbrance is a dedication to the public use. Usually the state of the property or the records constitute notice by which the purchaser is bound, whether his knowledge of the easement be actual or not."

The question was directly raised in *Schuchman v. Borough of Homestead,* 111 Pa. St., 48, and, after stating that a *bona fide* purchaser without notice is unaffected by notice to his vendor (*Bond v. Stroup,* 3 Binn., 66), and, therefore, if the defendants in that case purchased the land without notice, even if Phillips, their immediate vendor, had been notified of the dedication before his purchase, their title would be good, it was there said by the Court: "It is reasonably certain that the Homestead Bank and Life Insurance Company dedicated the land to the public, and that a number of persons purchased lots expecting to enjoy the resulting advantage. However, nothing in the plan, or in the course of title, or on the ground, was a warning to Ormsby Phillips of such dedication, and therefore he acquired a good title. The citizens of the borough suffer serious loss under the operation of a rule which applies to them as it would to an individual under similar circumstances." So in *Harbor v. Smith,* 85 Md., 538, the Court asserted the same principle

as applying to cases of dedication, saying: "It may be conceded that if there were any owners of lots who purchased under such circumstances and without notice of the contract or the agreement between the Patapsco and Brooklyn companies, they would have a standing in a court of equity." We think the same doctrine was impliedly recognized by this Court in *Collins v. Land Co.*, 128 N. C., at marg. p. 563 (Anno. Ed.).

In this case there is no reference in the deeds, as set out in the record, to the map of Bullock, and no deed in defendant's chain of title referring to the map. The testimony given by defendant's witnesses, a part of which we have recited, tends to show that there was nothing "on the ground" to warn Miller or Roper, his vendor, of any dedication. It is true, there was testimony to the contrary, but the court submitted the seventh issue to the jury, and, upon a presumably fair considera-

(33) tion of the evidence, they answered it in favor of defendants. The court let that issue stand and gave judgment on the entire verdict. Plaintiff did not ask that it be set aside as to the seventh issue, which application, if made, would have been addressed to the discretion of the court. There is no exception upon which the verdict as to that issue can now be assailed, and there could not well be, as plaintiff did not appeal, but defendants did. The court simply disregarded the legal effect of the seventh issue, and we presume for the reason that he did not think it prevented a recovery by the plaintiff, or, in other words, that the doctrine of *bona fide* purchaser without notice did not apply to the case. Even if the judge thought there was constructive or legal notice to defendant of the dedication—which there was not, as we have shown—he should have set aside the verdict upon that ground, so that defendant could review his ruling. As the issue and answer thereto were permitted to remain a part of the verdict, we cannot go behind it to inquire whether there was actual or constructive notice, as we give judgment not upon evidence, but upon the findings of fact, or the verdict of the jury. If the court was of opinion that there was no evidence to support the finding upon the seventh issue, or that it was against the weight of the evidence, the remedy was to set it, or the entire verdict, aside. In the absence of such a course of procedure, we cannot ignore the finding, nor could the judge, but must accept it as true and correct. There was strong and (if believed by the jury, which seems to have been the case) convincing proof to sustain their finding upon that issue.

The plan or map made by Tripp, the surveyor, for Dr. Bullock, was never attached to any of the deeds. It may be a fact that lots were sold to plaintiffs, except the town, and to others, with reference to the plan, but the evidence shows that it was never made public, but was found by J. P. Clark, plaintiffs' witness, among the papers of his father when the latter died. Looking at the whole case, we find that there was evidence

for the jury under instructions from the court, by which they were warranted in finding that there was "nothing in the plan, or in the course of (defendant's) title, or on the ground" to notify Miller or Roper of any dedication of land west of Pamlico Street for an- (34) other street, to be called Pungo, and, therefore, if in fact there was such a dedication, he purchased *bona fide* and without notice of it. *Schuchman v. Borough of Homestead, supra.* The deeds are not set out in the record, but only extracts therefrom showing the description. Some of them call for Pungo Street as the boundary of the lots conveyed thereby, but there is nothing in them to indicate where it is on the map, as the latter is not referred to. If they had referred to the map and it delineated the street, or if the jury had found that there were physical marks on the ground, of such a nature that defendant must have known of the dedication, a different question would be presented, as a purchaser is bound to take notice of an apparent easement, servitude, or dedication for a street or other way, and if he fails to do so, he buys at his peril and takes his title subject thereto. But all this, as we have said, was for the jury to consider before the verdict was returned, and under proper instructions from the court. The verdict only finds that Bullock owned the land covering the *locus in quo;* that he caused it to be surveyed and platted into lots and streets and sold lots with reference to the plat, and that on the map what is known as Pungo Street is designated as extending from Pamlico to Allen streets, and that defendant A. Miller has obstructed it, but that he purchased his lot without any notice of the dedication of the street. But there is no evidence that he ever saw the map or heard of it, and the mere fact that Bullock conveyed according to a hidden or concealed map and without reference thereto in his deeds, as far as appears, is certainly not legal notice to Miller of the dedication and location of the street. So that the important fact is omitted from the verdict, that Bullock, in contemplation of law, conveyed by the map, that is, by referring to it, and there is absolutely no evidence that Miller or Roper actually knew of the map or had ever heard of it. If there was, the jury were not influenced by it in making up their verdict, and it is for them to say what the facts are. In truth, they seemed to have repudiated the plaintiff's testimony as to there being any street known as Pungo, west of Pamlico, and to have accepted what defendants' witnesses testified in regard to that matter, viz., that the land was swampy and subject to the ebb and flow of the tide. (35)

Upon the verdict and the whole case, the court, in our opinion, should have given judgment for the defendants, and erred in entering judgment for the plaintiffs upon the verdict. This reverses the judg-

ment, and the court below will enter judgment for the defendants accordingly.

We have not considered the other serious questions as to the right of plaintiffs to an injunction, as we have not found it essential to do so. It may be that a municipal corporation, like the town of Belhaven, is entitled to have an obstruction in its streets removed, and for that purpose to have a mandatory injunction in a proper case. It has been held that it can bring ejectment, where a street, or a part thereof, is illegally withheld, and some courts hold that an injunction will lie as the more speedy and convenient remedy. We will decide those questions when properly and necessarily presented to us. If the town of Belhaven requires the land of the defendant Miller for public use as a street, it may be acquired by condemnation.

Reversed.

Cited: Sexton v. Elizabeth City, 169 N. C., 391, 394; *Guilford v. Porter,* 171 N. C., 360.

W. G. FOUNTAIN v. WEST LUMBER COMPANY.

(Filed 4 December, 1912.)

1. Principal and Agent—Trusts and Trustees—Corporations—Officers—Lawful Acts—Presumptions.

An ordinary contract made by the president of a corporation with respect to the corporate property is presumed to be lawful.

2. Same—Contracts.

Where one, as in this instance, the president of a corporation, contracts with reference to property which he holds as agent or in trust, and signs the contract individually, but is in fact therein acting as agent, he binds the principal to the transaction.

3. Principal and Agent—One-man Corporation—Fraudulent Devices—Evidence—Questions for Jury.

J. owned practically all of the stock in two corporations, the W. Co. and the J. Co., and with them, and by himself individually, was conducting a lumber business from the same office. He contracted with the plaintiff to move his sawmill on certain lands and cut the timber therefrom, and fell into arrears of payment, whereupon the plaintiff filed a lien against J. and J. Co., but, finding the timber rights were in fact owned by the W. Co., immediately filed a lien against them and brought this action. J. and the J. Co. went into bankruptcy and the W. Co. set up the defense that the W. Co. had sold the right to cut the tim-

ber to the J. Co. and that J. had made the contract in its behalf or in behalf of himself: *Held*, evidence was sufficient to be submitted to the jury as to whether J., in making the contract, was acting *bona fide* in behalf of himself or the J. Co., or whether the separate corporations were used as a device to avoid responsibility on the part of the W. Co.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1912, (36) of ONSLOW.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

G. V. Cowper, Duffy & Koonce for plaintiff.
D. E. Henderson and Frank Thompson for defendant.

CLARK, C. J. The defendant, the West Lumber Company, owned the trees and timber rights on a tract of land in Onslow, known as the "Turkey Pond tract on the Venters land." C. R. Johnson of Norfolk, Va., was president and secretary and owned practically all of the stock of the said company. He was also president and owned practically all the stock in the C. R. Johnson Lumber Company, and was also doing an individual business in his own name. All these different businesses dealt in lumber and timber and were conducted from the same office in the Bank of Commerce Building, Norfolk, Va. In 1909, C. R. Johnson contracted with the plaintiff to remove his sawmill to said "Turkey Pond" tract for the purpose of cutting and manufacturing the timber into boards, shingles, etc. The payments due the plaintiff for said work fell in arrears $1,200, and the plaintiff, under the advice of counsel, who thought that the timber rights were owned by the Johnson Lumber Company and C. R. Johnson, filed a lien against them. Upon investigation, finding that the timber rights were in fact owned by the West Lumber Company, the plaintiff immediately filed a lien against them and brought this action. C. R. Johnson and the C. R. Johnson Lumber Company went into bankruptcy. Under the bankrupt proceedings all (37) the *property* was claimed by the West Lumber Company, which was not in bankruptcy, while all the *debts* became the peculiar and exclusive assets of the bankrupts.

There were many exceptions to the evidence, but the only real vital question presented is whether there was sufficient evidence to go to the jury tending to prove that when C. R. Johnson contracted with the plaintiff he was acting on behalf of the West Lumber Company. The contention of the defendant is that it had sold the right to cut the timber to C. R. Johnson Lumber Company at $5 per thousand, and that the contract of plaintiff to cut it was made with Johnson either individually or acting in behalf of the C. R. Johnson Lumber Company. This issue was fairly submitted to the jury upon the conflicting evidence by his Honor, who told the jury in substance that if in making the contract

C. R. Johnson was *bona fide* acting in behalf of himself, or the C. R. Johnson Lumber Company, then the issue should be found against the plaintiff. But if, notwithstanding the evidence relied on by the defendant to that effect, the jury found that in fact the device of separate corporations was used in order to evade responsibility on the part of the West Lumber Company, Johnson being president and practically owner of all the stock in both companies, then the issue should be found in favor of the plaintiff. In *Watson v. Manufacturing Co.*, 147 N. C., 469, in which W. W. Mills was president, secretary, and practically owner of all the stock in the company, the Court said: "It is competent to show by evidence *aliunde*, and we think it fully proven, that the loan was in truth made to the company and not to Mills, although in form to the latter. 7 Thompson on Corp., sec. 8402; *Jones v. Williams*, 37 L. R. A., 682. Thompson at the end of paragraph 8402, says: "A contract made by the holder of a majority or most of the shares of a corporation, without disclosing that the person signing the contract acted as agent for the corporation, may nevertheless be shown by evidence, *aliunde*, to have been intended as a corporate contract, and should be specially enforced in equity as against such corporations.' Again,

'Although the form of the transaction may be such as to indicate
(38) that it is the individual debt of the president of a corporation, yet if in point of fact the money was advanced for the use of the corporation, to be repaid out of its funds, it will be bound to make it good,'" citing section 8412.

In the same opinion the Court says: "He combined in himself the four attributes of president, treasurer, general manager, majority stockholder, and actually sole stockholder. The powers of such a person are set out in Thompson, 8556, who says: 'A stranger dealing with the corporation is not affected by secret restrictions upon his powers of which he has no notice.'"

In *Peanut Co. v. R. R.*, 155 N. C., 148, plaintiff corporation was permitted to recover, though the bill of lading was issued in the individual name of its president, the shipment being in truth actually for the corporation.

The late Judge Womack discussed the question in his work on Corporations, page 236, sec. 469, and upholds the doctrine here contended for, citing *Osborne v. Manufacturing Co.*, 50 N. C., 177; *Rumbough v. Imp. Co.*, 106 N. C. 461, and *Froelich v. Trading Co.*, 120 N. C., 40.

The principle deducible from the *Rumbough case, supra*, is that where one deals with property which he holds as agent or in trust, and signs individually, but is acting as agent in reference to the property, then the principal is bound. We think where the president deals directly in reference to his corporation's property, since he has no lawful right to

deal with it individually, there should be a presumption that he acted lawfully, and in behalf of the corporation.

The evidence is voluminous and the exceptions are numerous. But practically that is the gist of the controversy, and it involved the determination of issues of fact by the jury. The charge of his Honor fairly submitted the evidence for their consideration. The jury have found that the contract, notwithstanding the methods and devices used, was made by the West Lumber Company, and that the plaintiff is entitled to recover on account of the work completed under said contract.

It can save no purpose to minutely consider the exceptions and details of the controversy, which has been determined by the finding of the facts by the jury.

Upon consideration of all the exceptions and giving due weight (39) to the able briefs filed by counsel on both sides, we are of opinion that there is

No error.

GILBERT COOK, ADMINISTRATOR OF L. C. TOLLEY, v. CRANBERRY FURNACE COMPANY.

(Filed 20 November, 1912.)

1. **Master and Servant—Dangerous Instrumentalities—Dynamite—Safe Place to Work—Inspection—Negligence—Evidence—Proximate Cause—Questions for Jury.**

When the master employs a servant to blast in his mine, it is his duty to make this mine as reasonably safe to work in as is practicable in such a dangerous vocation; and when, in an action to recover damages for a death wrongfully inflicted therein, there is evidence tending to show that the death was caused from a "failed hole," loaded with dynamite, which should have theretofore exploded with other charged holes of like character, and the drill boss failed in his duty to have inspected the mines for such "failed holes," and, contrary to his duty, permitted the deceased to select a place for drilling which resulted in his exploding one of them, it is sufficient to be submitted to the jury upon the issue of defendant's negligence, and it is for them to find whether this negligence of the defendant was the proximate cause of the injury under the circumstances.

2. **Master and Servant — Contributory Negligence — Pleadings — Burden of Proof—Issues—Instructions.**

When in an action for damages for the wrongful killing of plaintiff's intestate the issues of negligence and contributory negligence are presented, the latter upon the theory that the deceased met his death while acting in disobedience of the defendant's orders, as the proximate cause, requested instructions which refer this element of defense to the issue as to negligence are properly refused, as it is the duty of the defendant to plead such matters, and prove them under the issue of contributory negligence, unless it is proven by the testimony of the plaintiff.

APPEAL by defendant from *Adams, J.*, at Spring Term, 1912, of AVERY.

Civil action. These issues were submitted.

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(40) 2. Did the plaintiff's intestate by his own negligence contribute to the injury resulting in his death? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: Thirty-five hundred dollars ($3,500).

From the judgment rendered, defendant appealed.

J. W. Ragland, F. A. Linney for plaintiff.

S. J. Ervin, Harrison Baird for defendant.

BROWN, J. The counsel for defendant in their brief state that "the only exceptions which will be argued are the third, which is to the refusal of defendant's motion for judgment of nonsuit, and the fourth, fifth, sixth, seventh, and eighth, to the refusal of the defendant's special requests for instructions, and to the action of the trial judge in refusing to give and apply such portions of these requests as were given, to the first issue."

1. In our opinion, the motion to nonsuit was properly denied. The defendant admits in its answer that it owed a duty to the plaintiff's intestate to take reasonable precautions to prevent injury and to inspect the places where blasting was done, and to examine holes which had been charged with dynamite that failed to go off.

The evidence shows that the deceased was killed by an explosion of what is called a "failed hole," which is a hole in which dynamite has been loaded and fails to explode with the general explosion. The evidence of Stokes Freeman proves that it was his duty as drill boss to make an inspection every day of the holes in the mine which had failed to explode. He testifies that he did not make an inspection of the holes in the morning before the deceased was killed.

This witness further testifies that it was his duty to locate three holes for the deceased to drill, but that he failed to do so; that he selected two holes only and left the deceased and Pender Tolley to locate the other hole.

There is no evidence throwing any light upon how the deceased happened to strike the "failed hole," whether accidentally in locating the third hole or not. The deceased had the right to suppose that the inspection had been made and that the drill boss had located all the "failed holes," and that he would be warned of their proximity.

The decisions of this Court have settled the question that the defendant owed a duty to the deceased to make this mine as reasonably safe to

work in as is practicable in such a dangerous vocation; that its drill boss failed in his duty in making the proper inspection and search for "failed holes" on the morning of the disaster is an admitted fact. Whether such negligence was the proximate cause of the injury, the court properly left to the jury under the circumstances of this case.

2. The prayers for instruction referred to in our opinion relate exclusively to the question of contributory negligence. For some reason which is not apparent to us, the learned counsel for the defendant insist that they be directed to the first issue, and in refusing to so apply them, we think his Honor was correct.

Contributory negligence under our statute is a matter of defense, and the burden of proof is placed upon the defendant to establish it unless it is proven by the testimony offered in behalf of the plaintiff. The allegation of contributory negligence in this case consists in an averment that the deceased disobeyed the orders of his superior and that such disobedience was the proximate cause of his death.

In *Hicks v. Manufacturing Co.*, 138 N. C., 326, we said: "This entire matter as to disobedience of orders and its effect should more properly be submitted under the issue of contributory negligence where the burden of proof can be placed on the defendant as required by the statute."

We think, however, upon the second issue his Honor gave the defendant in the matter of instructions all that it was entitled to when he instructed the jury in these words:

"As to these matters, the court charges that if you find by the greater weight of the evidence that the plaintiff's intestate was doing his work subject to the orders of the drill foreman, and that the drill foreman gave him instructions not to use the failed hole in the mine, and that the intestate, in violation of the orders of the drill foreman, drilled into a failed hole which was charged with dynamite or giant powder, and thereby caused the dynamite or powder to explode and kill (42) him, and that he would not have been killed except for such disobedience of orders, you will in that event find that his failure to obey the instructions given was the proximate cause of his death, and your answer to the second issue will be 'Yes.'"

Upon a review of the whole record, we find

No error.

Cited: Buchanan v. Lumber Co., 168 N. C., 43; *Williams v. R. R.*, *ib.*, 362.

J. E. ERVIN v. FIRST NATIONAL BANK OF LENOIR.

(Filed 4 December, 1912.)

1. Usury—Renewal Notes—Interest Charged—Principal—Credits—Interpretation of Statutes.

The character of an instrument tainted with usury is not changed by renewals; and interest on the original note being forfeited by the illegal rate charged, any payment of money as interest made on the renewals should be credited upon the principal sum of the debt, which, under such circumstances, amounts to the loan of money without interest.

2. Usury—Interest Charged—Forfeiture—Interpretation of Statutes.

The full amount of the interest charged on an usurious instrument is forfeited under our statute, and not the difference between the usurious and the legal rate.

3. Usury—Interest Charged—Forfeiture—Pleadings—Appeal and Error.

It appearing from the referee's report, in this case, that a certain item of interest arising under an usurious contract was charged at the legal rate, and that no claim was made otherwise in the pleadings, it was error for the trial judge to overrule the referee, and to deduct double the amount of this item from the principal sum of the debt.

APPEAL by plaintiff from *Lyon, J.*, at August Term, 1912, of CALDWELL.

This is an action against the First National Bank of Lenoir, to recover usury alleged to have been paid, and to ascertain the amount due from the plaintiff to the defendant, or from the defendant to the plaintiff.

The defendant denied that it had charged or received usury, and demanded judgment for the balance alleged to be due it.

(43) The allegation in the complaint as to payments made by the plaintiff is as follows:

"5. That from the time that plaintiff began to pay 8 per cent interest in 1907, or from 1 January, 1908, to 11 November, 1910, he paid the defendant the sum of $684, the same being usurious, unlawful, and forbidden by law, and plaintiff avers that he is entitled to recover the said sum of $684 so paid to the defendant at the rate of 8 per cent, and in addition thereto the sum of $1,368, being double the interest charged plaintiff, which plaintiff avers he is entitled to recover by way of penalty, and the additional sum of $1,005 which plaintiff paid defendant, subject to the deduction of $2,985 which plaintiff borrowed of defendant, which would leave due plaintiff $72."

By consent, all issues raised were referred under The Code, and the following is the report of the referee:

"1st. That commencing in the year 1907 and continuing up to about 6 September, 1911, plaintiff was doing his banking business with defend-

ant, making deposits with and procuring loans from defendant bank as the exigencies of his business permitted and required.

"2d. That on 1 January, 1908, plaintiff owed the defendant the sum of $2,985 for money loaned, which loan was evidenced by the note of plaintiff for said sum. That the defendant has carried this loan since said date, but required the plaintiff to renew the evidence of said indebtedness from time to time by executing new note therefor and paying the interest thereon at the rate of 8 per cent, the interest being paid in advance at the time the plaintiff delivered his note to defendant renewing said indebtedness.

"3d. The summons in this action was issued and served on 2 November, 1911.

"4th. That on the dates given below, plaintiff renewed his indebtedness of $2,985 to defendant and paid interest thereon in advance at a rate greater than 6 per cent, to wit, 8 per cent, on three of said payments, and a little more than 7 per cent on the other payment. The following are the dates and amounts of said payments, to wit: (44)

November 18, 1909	$ 53.61
February 22, 1910	59.70
May 28, 1910	59.70
August 29, 1910	59.70
Total	$232.71

"This sum was knowingly charged and received by the defendant for the loan of $2,985 from 11 November, 1909, to 11 November, 1910.

"5th. That on 29 August, 1910, plaintiff executed and delivered to defendant a note, bearing date of 11 August, 1910, and due 11 November, 1910, renewing his said indebtedness of $2,985, and on said 29 August, 1910, the defendant knowingly charged and received interest at the rate of 8 per cent on said debt to the maturity of said note, which sum is charged above. That said note drew 6 per cent after maturity. That plaintiff failed to pay or renew said note at maturity, and said note is still held by the defendant. That on 6 September, 1911, plaintiff caused to be paid and defendant knowingly charged and received the sum of $146.75 and credited same as interest on said note from 11 November, 1910, to 6 September, 1911. That this sum represents 6 per cent interest on said note from said time.

"6th. That the amount knowingly charged and received by defendant on said loan of $2,985 from 11 November, 1909, to 6 September, 1911, as interest, is the sum of the items in my finding of facts Nos. 4 and 5, above, to wit, $232.71 and $146.75, making a total amount of interest knowingly charged and received on said debt for one year nine months

and twenty-five days of $379.46, which is $53.60 more than the legal rate of 6 per cent.

"7th. That from 2 November, 1908, to 1 November, 1909, defendant knowingly charged and received interest on said loan at the rate of 8 per cent, making a total amount of $238.80 for said time.

"8th. That on 6 September, 1911, plaintiff caused to be paid and defendant received and credited on the principal of said note the sum of $858.25.

(45) "Conclusions of law:

"1st. That the burden is on the plaintiff to establish his contentions by the greater weight of evidence, and to show that his cause of action, if any, is not barred by the statute of limitations, and I have applied this rule of law in finding facts.

"2d. From facts found in the second, third, and seventh findings of facts, above, I conclude as a matter of law that defendant knowingly charged and received from plaintiff usury to the amount of $238.80 up to 1 November, 1909, but that the statute of limitations, as contained in subsection 2 of section 396 of the Revisal of 1905, applies to this item of charge, and that plaintiff's cause of action, therefore, is barred and plaintiff is not entitled to recover.

"3d. From the facts found in the third and fourth finding of fact, I conclude as a matter of law that defendant knowingly charged and received from the plaintiff usury to the amount of $232.71, and that plaintiff is entitled to recover in this action double said sum of $232.71, to wit, the sum of $465.42.

"4th. From the facts found in the third, fifth, and sixth findings of fact, above, I conclude as a matter of law that the defendant knowingly charged and received from plaintiff usury to the amount of $146.75, and that plaintiff is entitled to recover in this action double said usurious charge of $146.75, to wit, the sum of $293.50.

"5th. From facts found in the third, fourth, and fifth findings of fact, above, I conclude as a matter of law that all unpaid interest on said note is forfeited and no interest can be charged or collected thereon.

"6th. From facts found in the finding of fact, above, I conclude that plaintiff is entitled to a credit of $858.25 on this indebtedness to defendant as of 6 September, 1911.

"7th. That upon the facts found in fourth, fifth, and sixth findings of fact, plaintiff is entitled to a credit of $785.92, being the penalty adjudged against the defendant in my third and fourth conclusions of law above.

(46) "8th. From the facts found in the fifth finding of fact above, I conclude as a matter of law that the defendant is entitled to judgment against the plaintiff on the note alleged in its further defense

for the sum of $1,367.83, this being the balance due after allowing all credits and penalties, with interest after final judgment is entered, and for costs of this action, to be taxed by the clerk, except allowance to referee and stenographer, which should be paid one-half by plaintiff and one-half by the defendant."

The defendant filed several exceptions to the report, but all depend on the first, which is:

"1st. The referee erred in his sixth finding of fact in adding the sum of $146.75 to the sum of $232.71, for that the said payment of $146.75 was the payment of the legal interest due on the note referred to and as shown in the said referee's fifth finding of fact. That said payment of $146.75 is a separate transaction, represents the amount of the legal interest on said note, and is untainted with usury."

The referee credited the note for $2,985 with $758.92 (this being twice the items paid of $232.71 and $146.75) and with the payment of $858.25, making a total of credits of $1,617.17, and recommended that judgment be entered in favor of the defendant for the difference, $1,367.83.

His Honor sustained the first exception, and eliminated the item of $146.75 from the credits, and thereby increased the amount found to be due by the refree, $293.50 (being twice $146.75), and making the total for which judgment was rendered $1,661.33, and the plaintiff excepted and appealed.

W. B. Councill and Lawrence Wakefield for plaintiff.
Mark Squires for defendant.

ALLEN, J. No question is raised by this appeal except as to the effect of the payment of $146.75, and as to that there is no allegation of usury, nor is there any demand in the complaint for the recovery of double this amount, the penalty prescribed by statute for receiving usurious interest.

In the complaint, the plaintiff charges that, from 1 January, 1908, to 11 November, 1910, he paid $684, "the same being usurious, unlawful, and forbidden by law," and he demands that he be credited with double that amount, and this is the only allegation of usurious (47) payments.

The item of $146.75 cannot be a part of the sum of $684, because it was paid on 6 September, 1911.

Again, he alleges that in addition to the credit of twice the sum of $684, usurious interest, he is entitled to be credited with $1,005, "which plaintiff paid defendant," without any allegation that illegal interest was included in the payment, and this amount is made up of $858.25 and $146.75, both paid on 6 September, 1911.

It follows, therefore, that as the plaintiff has not alleged that the payment of $146.75 was usurious, and has not brought this action to recover the penalty for receiving the same, he is not entitled to be credited with double that amount.

We are, however, of the opinion that he is entitled to have the payment credited on the principal sum due by him, as he demands in his complaint.

Commenting on the section of the National Banking Act dealing with usury, which in this respect is almost identical with our statute, the Supreme Court of the United States says, in *Brown v. Bank,* 169 U. S., 416: "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid."

The same Court says, in *Haseltine v. Bank,* 183 U. S., 130: "Two separate and distinct classes of cases are contemplated by this section:

(48) first, those wherein usurious interest has been taken, received, reserved, or charged, in which case there shall be 'a forfeiture of the entire interest which the note, bill, or other evidence of debt *carries with it,* or which has been *agreed to be paid* thereon'; second, in case usurious interest has been *paid,* the person paying it may recover back twice the amount of the interest 'thus paid from the association taking or receiving the same.' While the first class refers to interest taken and received, as well as that reserved or charged, the latter part of the clause apparently limits the forfeiture to such interest as the evidence of debt carries with it, or which has been agreed to be paid, in contradistinction to interest actually *paid,* which is covered by the second clause of the section"; and in *Bank v. Watt,* 184 U. S., 151: "The argument that the recovery should have been limited to twice the amount by which the usurious interest exceeded the legal rate is predicated on what is assumed to be the correct construction of the second sentence of section 5198 above quoted. The sentence relied on is as follows: 'In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action

is commenced within two years from the time the usurious transaction occurred.' It is urged that the statute is penal in its character and must be strictly construed; therefore the sentence relied upon must be interpreted as relating solely to the usurious portion of the interest paid, and not to so much of the rate of interest as was lawful. Although it be conceded that the statute is penal in character, we do not consider, even under the strictest rule of construction, it is possible to give to it the meaning contended for without departing from its unambiguous letter, and thereby frustrating its obvious intent. The first sentence of the section provides that the 'taking, receiving, reserving, or charging a rate of interest greater than is allowed, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.' This, without the slightest ambiguity, provides for the forfeiture, not of the amount by which the usurious has exceeded (49) the lawful rate, but of the entire interest."

As the renewals, according to these authorities, do not change the nature of the transaction, and interest is forfeited when usury is charged, the debt became, after that time, simply a loan of money bearing no interest (*Smith v. B. and L. Assn.,* 119 N. C., 255).

Applying these principles to the facts, the credit of $146.75 must be allowed to the plaintiff, as it is not denied that the amount was paid to the defendant and has been credited on the note, and as the note bears no interest by reason of the usury.

It is, therefore, ordered that the judgment of the Superior Court be reformed by deducting from the amount recovered $146.75, and as thus modified, that it be affirmed.

Let the costs be divided.

Modified and affirmed.

Cited: Williams v. Bank, post, 50; *Owens v. Wright, post,* 133; *Corey v. Hooker,* 171 N. C., 233, 234.

B. F. WILLAMS, RECEIVER, v. FIRST NATIONAL BANK OF LENOIR.

(Filed 4 December, 1912.)

Usury.

The question in this case of double the amount of interest paid under an usurious contract controlled by the decision of *Ervin v. Bank, ante,* 42.

APPEAL by plaintiff from *Lyon, J.,* at August Term, 1912, of CALDWELL.

The pleadings and facts are in all material respects like those in *Ervin v. Bank, ante,* 42, except in this case the referee credited the plaintiff with $170.31, the item in controversy, instead of with double the amount paid, as he did in the *Ervin case.* His Honor sustained an exception to allowing the amount, $170.31, as a credit, and the plaintiff excepted and appealed from the judgment rendered.

W. B. Councill and Lawrence Wakefield for plaintiff.
Mark Squires for defendant.

(50) ALLEN, J. The decision of this appeal is controlled by *Ervin v. Bank, ante,* 42, and for the reasons therein stated, it is ordered that the judgment of the Superior Court be reduced by the sum of $170.31.

Reversed.

C. T. PEELE v. I. G. POWELL, ADMINISTRATRIX.

(Filed 14 December, 1912.)

Evidence—Questions for Jury.

Upon a rehearing of this case it is held that the rules of law heretofore laid down are correct; but upon reconsidering the facts, the majority of the Court hold the evidence sufficient to be submitted to the jury.

BROWN and ALLEN, JJ., dissenting.

L. L. Smith for plaintiff.
Winston & Matthews for defendant and administrator d. b. n. and defendant.

CLARK, C. J. This is a petition to rehear. There is no division in the Court as to the propositions of law laid down on the former hearing; but upon a fuller consideration of the facts, the majority of the Court are now of opinion that there was sufficient evidence to submit the case to a jury.

Petition allowed.

(51)

N. M. PONDER v. GEORGIANA GREEN.

(Filed 11 December, 1912.)

1. **Bills and Notes—Agreement—Novation—Deeds and Conveyances—Escrow—Continuing Liability.**

The plaintiff and defendant entered into a contract to support their mother in consideration of her deed to certain timber interests on her lands and a conveyance of part of the realty, and the defendant gave plaintiff a note for money the latter had advanced in order to enable him to meet his obligations thereunder. Thereafter the other children and heirs at law objected to this arrangement and threatened suit to set aside the deed, but, instead, agreed with the plaintiff and defendant that their deed should be set aside, and that each was to repay the moneys advanced, in certain portions. To that end and until each of the children should have paid his part, a deed in escrow was delivered which created a charge upon the lands held by each for the support of the mother. The plaintiff retained the defendant's note under the agreement that a certain one of the children, a married woman, should pay thereon the sum she had obligated to pay under the arrangement, and demand was made on her and the defendant therefor before the institution of this action to recover the amount: *Held*, the agreement between the children was not a novation of the note, and plaintiff was entitled to recover thereon, as the defendant continued liable, as the payment to be made by the other child under the agreement was to have been accepted as a credit on the note.

2. **Reference—Exceptions—Appeal and Error—Debtor and Creditor—Agreements—Bills and Notes—Continued Liability—Novation—Practice.**

In an action to recover upon a note, the defense was relied upon that under a subsequent agreement the plaintiff released the defendant from liability thereon by substituting, for a valuable consideration, another in his place. The matter was referred, report made to the court, and judgment was erroneously entered against the plaintiff without passing upon his exceptions. The cause is remanded for the exceptions to be heard and for the trial court to ascertain whether, by the subsequent agreement, upon the facts, the defendant was released from liability on his note; and if not, the plaintiff is entitled to recover the amount found due, and costs.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1912, of RUTHERFORD.

This is an action to recover judgment on a note for $426.58, the defendant pleading payment.

The issues raised by the pleadings were referred, and the report of the referee is as follows:

1. That the defendant, on 1 April, 1910, executed and delivered to the plaintiff her promissory note in the sum of $426, bearing interest from date and due and payable nine months after date.

(52) 2. That the plaintiff and defendant, on and prior to 1 April, 1910, were partners, engaged in supporting and caring for their mother, Margaret Ponder, their said mother having previously executed and delivered to them a deed for a tract of land in Polk County containing something over 200 acres, in consideration of her care and support; and said note was given in payment of a balance found to be due from defendant to plaintiff, expended in the care and support of their said mother.

3. I find that the following payments were made on said note by defendant on the following dates, to wit: $26.58 on 1 April, 1910; $20 on 10 May, 1910.

4. I find as a fact that the following named children of Margaret Ponder, brothers and sisters of plaintiff and defendant, to wit, J. T. Ponder, O. W. Ponder, Mrs. Lizzie Miller, upon learning that their said mother had executed and delivered said deed to plaintiff and defendant, became dissatisfied and threatened to bring suit against plaintiff and defendant to have said deed declared void. That the said deed in terms gave plaintiff practically all the timber standing and growing on said land, in addition to one-half interest in the soil, and the plaintiff cut and removed or caused to be cut and removed the said timber, the value of which I find to be $900.

5. That some time prior to 26 November, 1910, the plaintiff and defendant and their said mother, in order to avoid family discord and to avoid possible litigation, entered into the following verbal agreement with the said J. T. Ponder, O. W. Ponder, and Mrs. Lizzie Miller, to wit: That plaintiff and defendant would convey to J. T. Ponder one-sixth of said land, to Mrs. Lizzie Miller one-sixth of said land, and to O. W. Ponder two-sixth of said land (he having previously purchased the respective interests of his eldest sister therein), the said land to be surveyed and the interest of each of the parties to be determined by metes and bounds; that the plaintiff, N. M. Ponder, should retain and not be accountable for the proceeds of the timber cut and removed by him; that the plaintiff would credit said note which he held against defendant with the sum of $150 upon the said J. T. Ponder, O. W. Ponder, and Mrs. Lizzie Miller paying the balance due thereon, which they agreed to do, and which was ascertained to be $230, the said

(53) J. T. Ponder and Mrs. Lizzie Miller to pay the sum of $57.50 each, and the said O. W. Ponder to pay the sum of $115; and that all of said children should make and execute a deed of trust upon their said land in favor of their said mother to secure the sum of $150 annually for her support and maintenance, each share thereof to be charged with the sum of $25.

6. That in pursuance of said agreement the said parties caused to be made a survey of the land and the shares of each set apart in metes and bounds, and on 26 November, 1910, all of said parties except Mrs. Miller met on the premises and the plaintiff and defendant executed deeds to the other parties for their respective interests, which it was agreed they should have in said land, and delivered all said deeds except the one in favor of Mrs. Lizzie Miller; that J. T. Ponder paid plaintiff the sum of $57.50 and O. W. Ponder the sum of $115, which plaintiff credited upon said note of said date; that plaintiff on said date placed a credit of $150 on said note, in terms as follows, to wit: "November 26, 1910, by gift on note, $150," and that all of said parties executed and delivered to their said mother a deed of trust upon said land to secure her in her support and maintenance, as they had agreed to do.

7. I find as a fact that Mrs. Lizzie Miller is now and on 26 November, 1910, and prior thereto, was a married woman, resident in the State of South Carolina; that the said Mrs. Miller failed to pay anything on said note on 26 November, 1910, and has not yet paid anything on said note to the plaintiff or another person for him; that said deed in favor of Mrs. Miller has never been delivered, but was placed in the hands of G. W. Waycaster, to be held by him until Mrs. Miller should pay plaintiff the sum of $57.50 on said note; and the plaintiff, prior to the bringing of this suit, requested and demanded payment thereof from both Mrs. Miller and the defendant in this action.

Conclusions of law:

1. That on 26 November, 1910, the defendant was indebted to plaintiff on the note set out in the complaint in the sum of $230.

2. That prior to 26 November, 1910, the plaintiff and defend- (54) ant, upon a sufficient consideration, entered into a contract, set forth in paragraph 5 of the findings of facts foregoing, and that all the parties to said contract on said day of November, 1910, fully performed their respective parts thereof, except Mrs. Lizzie Miller, and said contract was and is a valid and binding contract as to all of said parties except Mrs. Miller, and that she, being a married woman, was not and is not bound thereby.

3. That the plaintiff is entitled to recover of the defendant the sum of $57.50, with interest from 26 November, 1910.

The defendant filed the following exceptions:

1. The referee erred in failing to find as a fact from the evidence that Mrs. Green, the defendant, was to be absolutely discharged of all liability by reason of the said note given to plaintiff—that is, in the settlement made by the family, as shown by the evidence. This note was to be discharged by the parties, and she was to be relieved from any payments

thereof, and thereby relinquish her one-half interest in the lands set out in the complaint.

2. The referee erred in that he failed to find as a fact, from the evidence, that Mrs. Miller had agreed with the plaintiff, after the agreement of the family, to pay the amount due ($57.50), and that she had been ready, able, and willing to pay the said $57.50 and take deed according to the original family settlement.

3. That the referee erred in finding as a conclusion of law that Mrs. Miller, being a married woman, was not bound by the contract of settlement made between the several children to avoid litigation.

4. That the agreement between the parties would have empowered plaintiff to proceed against the land, and the deed in escrow held by Waycaster was a mortgage to the plaintiff for such amount as was due him.

5. That the referee erred in not finding that there was a novation, and that the defendant, Georgiana Green, by the said novation, was to be discharged of all liability, and that the other heirs at law were to be responsible to the plaintiff, and that he accepted the responsibility in the family agreement aforesaid.

(55) His Honor did not pass on the exceptions to the report, but permitted Mrs. Miller to be made a party, and upon the payment by her of $57.50 into the clerk's office to the use of the plaintiff, entered judgment against the plaintiff for the costs of the action, and he excepted and appealed.

R. S. Eaves and S. Gallert for plaintiff.

D. F. Morrow and McBrayer & McBrayer for defendant.

ALLEN, J. The exceptions to the report of the referee have not been passed on or considered, and the report has not been disturbed.

The referee finds that the plaintiff agreed to credit the note "which he held against defendant with the sum of $150, upon the said J. T. Ponder, O. W. Ponder, and Mrs. Lizzie Miller paying the balance due thereon, which they agreed to do, and which was ascertained to be $230, the said J. T. Ponder and Mrs. Lizzie Miller to pay the sum of $57.50 each, and the said O. W. Ponder to pay the sum of $115; and that all of said children should make and execute a deed of trust upon their said land in favor of their said mother to secure the sum of $150 annually for her support and maintenance, each share thereof to be charged with the sum of $25"; and further, that "Mrs. Miller failed to pay anything on said note on said 26 November, 1910, and has not yet paid anything on said note to the plaintiff or another person for him; that said deed in favor of said Mrs. Miller has never been delivered, but was placed in the hands of G. W. Waycaster, to be held by him until Mrs. Miller should

pay plaintiff the sum of $57.50 on said note; and the plaintiff, prior to the bringing of this suit, requested and demanded payment thereof from both Mrs. Miller and the defendant in this action."

According to these findings, the plaintiff retained his note against the defendant, and did not agree to accept the promises of Mrs. Miller and others in settlement of it, but to enter the credits when the money was paid.

If so, the liability of the defendant continued, and upon the report the plaintiff is entitled to judgment against her for the amount found due, and costs.

If, upon hearing the exceptions, the finding by the referee shall (56) be reversed, and it shall be found that a settlement was made by the terms of which the defendants was discharged from liability on the note, it would be proper to enter judgment against the plaintiff for costs.

We conclude, therefore, that there is error, and the cause is remanded to the end that the exceptions may be heard and passed upon.

Reversed.

O. D. DAVIS ET AL., TRUSTEES, v. CITY OF SALISBURY.

(Filed 4 December, 1912.)

1. Taxation—Constitutional Law—Exemptions — Religious Purposes — Rents and Profits—Interpretation of Statutes.

Our Legislature, in accordance with the authority conferred by section 5, Article V of the Constitution, in exempting property held for charitable and religious purposes, have not extended the exemption so as to apply to property held by trustees charged with paying over to institutions of that character the rents and profits of real estate held by them for that purpose, though the "entire rents are faithfully used and applied exclusively" thereto.

2. Same—Words and Phrases.

Apart from the view that the Revenue Act of 1911, ch. 46, professes to deal with corporations which have been favored with exemptions, and giving the statute a more general application, the exemption specified as to rents applies only to those "used exclusively for charitable or benevolent purposes," and a devise of lands to trustees directing that the rents be applied to "charitable, benevolent, and religious purposes" does not come within the statutory exemption.

3. Same—Benevolent Societies.

Construing together the various sections of chapter 46, Laws 1911, upon the subject of the exercise by the Legislature of the authority to exempt certain property held for religious, educational, and other pur-

poses, it is *Held* that neither the property of churches and other religious bodies held for rent nor the rent from such property is exempt from taxation; whereas, in the case of benevolent and charitable societies, both the building used for lodge and meeting purposes and the "proceeds and profits arising from rents, leases, etc., of rooms in such buildings are exempt" when such rents are used for charitable and benevolent purposes.

4. Taxation—Constitutional Law—Exemptions—Revenue and Machinery Acts—Interpretation of Statutes.

The Revenue and Machinery Acts of the Legislature should be construed together, and the Revenue Act of 1911, sec. 5, was not designed or intended to establish or provide for any specific exemption, but with a view of repealing former exemptions and as a general declaration of the policy of the Legislature in carrying out the permissive features of our Constitution, Art. V, sec. 5, whereas section 7 of the Machinery Act of that year expresses the particular intent of the Legislature as to the exemptions to be allowed, and should there be a conflict between the two acts, the latter will prevail.

(57) APPEAL by plaintiff from *Cooke, J.*, at August Term, 1912, of ROWAN.

Civil action heard on case agreed. The action was to determine the validity of a tax assessed by defendant against certain property held by plaintiffs as trustees of the First Presbyterian Church of Salisbury, N. C. On the hearing, it was properly made to appear that plaintiffs, as trustees of First Presbyterian Church of Salisbury, held certain real estate in the city of Salisbury, under the will of Maxwell Chambers, deceased; said will devising for the use and benefit of the church "all those lots or parcels of ground I own adjoining the First Presbyterian Church, to be an appendage of said church," etc., "and so improved with buildings as will by their rent provide revenue for the church," etc. The facts concerning the property more directly relevant to the inquiry are stated in the case agreed, as follows:

6. That said real estate is held by plaintiffs as elders and trustees, as aforesaid, for the use and benefit of said First Presbyterian Church of Salisbury, N. C., and that the same is rented out and the entire rents faithfully used and applied exclusively for charitable, religious, and benevolent purposes.

7. That the church building and the lot on which it stands, as well as the parsonage, with garden and barn or pasture lots, are not included in the above described lands, nor in said levy of taxes, and are exempt from taxation.

(58) The municipal government, under the powers of the charter, having assessed the property other than that described in section 7, the tax amounting to $166.75, the plaintiffs paid the same under protest and brought present suit to recover the payment, having otherwise

complied with requirements of Revisal, sec. 2855. The case agreed tersely states the question presented as follows: "The question submitted is, whether said real estate, so held in trust by plaintiffs, is subject to taxation by defendant and liable to the levy." The court, being of opinion that the property was subject to taxation, entered judgment that defendant go without day, and plaintiffs excepted and appealed.

Kluttz & Kluttz for plaintiff.
Walter H. Woodson for defendant.

HOKE, J. In the well-considered case of *United Brethren v. Commissioners,* 115 N. C., 489, it was held:

"Under section 5 of Article V of the Constitution, the Legislature may exercise to the full extent, or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable, or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the Legislature can exempt the property up to a certain value, and tax all above it, and may also tax property held for one of the purposes named, and exempt that held for others.

"2. Under chapter 137, Acts of 1887; chapter 218, Acts of 1889, and chapter 326, Acts of 1891, exempting from taxation property set apart and exclusively used for religious, charitable, or educational purposes, only such property was meant as was used directly, immediately, and solely for the purposes named, and hence property rented out was not exempt, though the rents so applied were."

These principles are in accord with well-considered cases in other jurisdictions, construing statutes of similar import, and, applied to the facts presented, here, are in full support of his Honor's ruling, this being property devised to "produce revenue for the church" and which is held for rent by the church authorities under the terms of the will, and this, though the "entire rents are faithfully used and applied exclusively to charitable, religious, and benevolent purposes." (59)

Exemption is claimed in this instance by reason of section 5 of the General Revenue Act of 1911, ch. 46, Laws 1911, in terms as follows: "Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations shall be liable to taxation, except property belonging to the United States and to municipal corporations and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: *Provided*, that no property whatever held or used for investment, speculation, or rent shall be exempt, unless said rent shall be used

exclusively for charitable or benevolent purposes or to pay the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions"; the position being—

1. That on the facts stated, this section exempts the rented property from taxation, "the entire rents being faithfully and exclusively applied to charitable, religious, and benevolent purposes."

2. The Revenue Act, being the statute imposing the taxes, is superior to the Machinery Act of 1911, ch. 50, sec. 71, which is more restricted and excludes the property from the benefits of the exemption; but, in our opinion, neither the fact embodied in the first position nor the deduction from it in the second can be successfully maintained. Pretermitting the view that the revenue act in question professes to deal with corporations which have been favored with exemptions, and giving the statute a more general application, the section quoted, after exempting property held for churches, religious, charitable, and benevolent societies, etc., contains the proviso that "no property held for investment, speculation, or rent shall be exempt unless the rent shall be used exclusively for charitable or benevolent purposes."

The property in question here was devised to be rented for church revenue and the rents no doubt chiefly devoted to such purpose. The case agreed expressly states that the rents have been applied faithfully
(60) to charitable and benevolent and to *religious* purposes. Even if the revenue act could be properly construed as establishing an exemption from taxation, the plaintiff's property does not come within its terms. The rents are not exclusively used for charitable and benevolent purposes. To show that this position is of the substance, the Machinery Act of 1911, ch. 50, sec. 71, continues the distinction between these subjects and makes separate provision for each. Thus in section 71, subsec. 3, the exemption of real property held by churches and religious bodies is exempt, as follows: "Buildings, with the land they actually occupy, lawfully owned and held by churches or religious bodies and wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building. The occasional leasing such buildings for schools, public lectures or concerts, or the leasing of such parsonages shall not render them liable to taxation." Section 5 provides for the exemptions in favor of Young Men's Christian Associations and other religious societies. Section 6 establishes the exemptions in case of benevolent and charitable associations, as follows: "Buildings, with the land they actually occupy, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such associations, together with such additional adjacent land as may be necessary

for the convenient use of the building for such purposes; and also the proceeds and profits arising from rents, leases, etc., of rooms in said building, whether occupied for lodge and meeting purposes or not, when such rents, proceeds, and profits are used for charitable and benevolent purposes."

From a perusal of these different sections, it appears that neither the property of churches and other religious bodies held for rent nor the rents from such property are exempt from taxation, whereas in the case of benevolent and religious societies, both the building use for lodge and meeting purposes and the "proceeds and profits arising from rents, leases, etc., of rooms in such buildings are exempt," when such rents, etc., are used for charitable and benevolent purposes. Again, while the Revenue Act, if it established an exemption in positive terms, might, in case of conflict, be considered as controlling, the Revenue and Machinery Acts are to be construed as a whole and made to har- (61) monize, if this can be done by fair and reasonable interpretation.

In the present case this section 5 of the Revenue Act, relied upon by plaintiffs, is not, in our opinion, designed or intended to establish or provide for any specific exemption. It was drawn more especially with the view of repealing former exemptions and as a general declaration of the policy of the Legislature in carrying out the permissive features of our Constitution, Art. V, sec. 5, in which the General Assembly is allowed, if it see proper, to exempt this kind of property from taxation, and, in our view, it does not establish any exemption; whereas the Machinery Act, sec. 7, is clearly drawn for the express purpose of establishing and defining the exemptions which shall be allowed, making minute regulations as to the different subjects and specific kinds of property which shall be exempt, and if there were conflict in these two statutes, as plaintiff contends, the latter, expressing the particular intent of the Legislature, should prevail. *School Commissioners v. Board of Aldermen,* 158 N. C., pp. 191-198, citing 1 Lewis Southerland (2 Ed.), sec. 268; *Rodgers v. U. S.,* 185 U. S., p. 83, and other authorities. In *Rodgers' case, Associate Justice Brewer* quotes with approval from 22 Mich., 322, as follows: "When there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict." On careful consideration of the question presented, we are of opinion that the plaintiff's property referred to in

the case agreed is not exempt from taxation and that the judgment of the court below, based upon that proposition, must be

Affirmed.

Cited: Southern Assembly v. Palmer, 166 N. C., 80.

(62)

W. T. JUSTICE ET AL. v. CITY OF ASHEVILLE.

(Filed 4 December, 1912.)

1. Cities and Towns—Sewerage—Special Benefits—Assessments—Pleadings.

When the charter of a city expressly provides that only such property as is specially benefited by the construction of sewers shall be liable to assessments, and the owner of property who had been assessed for the purposes of laying the sewer does not allege, in his action to avoid payment, that the assessment laid against his property exceeds the benefits thereby derived by him, the corporate action of the city, being within the legislative powers conferred, is valid.

2. Cities and Towns—Sewerage—Special Benefits — Assessments — Notice — Appeal—Taxation—General Fund.

When the Legislature has conferred upon a city the power to assess within a prescribed district the property of adjoining owners in accordance with the direct benefits received by them from the laying of the city's sewers in the streets, and gives them opportunity to challenge and review the assessments thus made, it is not necessary for the act to provide that, in making these assessments, it should be considered that the owners of the land were taxed for the purpose of sewerage in other parts of the town, the cost thereof being paid from the general fund of the city. *Asheville v. Trust Co.,* 143 N. C., 366, cited and applied.

3. Cities and Towns—Sewerage—Assessments—Districts—Legislative Powers—Presumptions—Appeal and Error.

A city must have laid off special districts wherein its citizens are liable to be assessed in accordance with the direct benefits received by them in constructing its sewerage system; but this may be done by the Legislature in the act authorizing it, or by the city under the power to make such improvements, and the proper exercise of such authority and the regularity of the proceedings is presumed on appeal, when the record is silent.

APPEAL by plaintiffs from *Long, J.,* at April Term, 1912, of BUNCOMBE.

This action was brought by the plaintiffs, as citizens, taxpayers, and property-owners of the city of Asheville, to restrain the collection of certain assessments charged against their property for the construction of sewers, and was heard on complaint and answer.

The motion for a restraining order was denied, and the plaintiffs excepted and appealed. The complaint is as follows: (63)

1. That the plaintiffs are citizens and residents and the owners of real and personal property situated in the city of Asheville, North Carolina, and that the defendant, the City of Asheville, is a municipal corporation, organized under the laws of North Carolina.

2. That prior to the year 1901, the said city of Asheville, in order to enable it to construct in said city a system of sewerage, under and by virtue of the authority of the General Assembly of North Carolina, issued and sold its coupon bonds amounting to the sum of about $300,000, and with the funds thus raised laid in the city of Asheville a system of sewers, as hereinafter alleged. That said coupon bonds of the city of Asheville, or renewals thereof, are still outstanding and unpaid and bearing interest payable semiannually, and the property in the city of Asheville is annually taxed to pay the interest on said bonds and is liable to be taxed for the purpose of raising funds to pay the principal of said bonds as they mature.

3. That under and by virtue of the charter of the city of Asheville as it existed prior to the year 1901, and by means of the funds and money raised by the sale of said coupon bonds, as hereinbefore mentioned, the city of Asheville laid on all of the principal streets in said city and in front of all of the most valuable property in said city, including the entire business section of said city and all of the best and most valuable residence portions of said city, a system of sewers, all of which were laid at the public expense and out of the funds derived from the sale of said bonds as aforesaid. That from said bonds, as the plaintiffs are advised and believe, sewers were laid in the city of Asheville on Pack Square, North Main and South Main streets, College Street, Woodfin Street, Spruce Street, Vance Street, Oak Street, Merrimon Avenue, Orange Street, Central Avenue, Clayton Street, Charlotte Street, Pine Street, Chestnut Street, East Street, Center Street, Hillside Street, Liberty Street, Border Street, Water Street, Penland Street, Hiawassee Street, Haywood Street, Flint Street, Cherry Street, Starnes Avenue, Cumberland Avenue, Bearden Avenue, West Chestnut Street, Cullowhee Street, Soco Street, Monford Avenue, Watauga Street, (64) West Haywood Street, Depôt Street, Ann Street, French Broad Avenue, Philip Street, Grove Street, Ashland Avenue, Church Street, Lexington Avenue, Southside Avenue, Market Street, Davidson Street, Valley Street, Bartlett Street, and various other streets in said city. That the above mentioned streets and the sewers laid thereon are the streets and sewers in front of most of the roperty in the city of Asheville, and especially in front of that property which is more valuable in

proportion to the size of lots and more valuable in the improvements on it than any other portion in the city of Asheville.

4. That pretending to act under and by virtue of chapter 100 of the Private Laws of 1901, section 71, and the Laws of North Carolina amendatory thereof, since the year 1901, the said city of Asheville, through its mayor and board of aldermen, proceeded to lay sewers on certain of the streets in the city of Asheville and partially on those streets on which the property of the plaintiffs above mentioned abuts, and have, by virtue of said statute and of the proceedings conducted under the same, attempted to levy assessments upon the property of these plaintiffs for the cost and expense of laying said sewers on said streets, and now claims a lien on the property of the said plaintiffs and each of them, and is threatening and endeavoring to enforce the same by virtue of said alleged claim of lien, and are threatening to advertise the same for sale by virtue of said lien and have thus encumbered and cast a cloud upon the title of the plaintiffs to their said property, and have injured and damaged the plaintiffs irreparably. That the said city of Asheville claims assessments against the property of the plaintiffs above mentioned, for laying sewers on streets in said city and in front of their property, as follows:

W. T. Justice, McDowell Street	$ 96.28
F. P. Ingle, Black Street	56.06
Mrs. Z. W. Israel, 103 Blanton Street	30.67
R. T. Schank, McDowell Street	68.40
R. T. Schank, Choctaw Avenue	176.00
L. L. Brookshire, Black and Brookshire streets	102.96
H. M. Sprose, Black Street	18.00
(65) H. M. Sprose, Ralph Street	27.30
H. M. Sprose, Ashland Avenue	62.17
J. O. Whitted, Black Street	100.00
James Stanback	43.59
John Lochran	45.29
J. M. Spurlin, Blanton and Phifer	99.55
C. M. Williams, Blanton	66.12
C. P. Miller, Blanton	53.50
C. R. Perry, Phifer	21.00
P. H. Thrash, Blanton Street	137.50
W. C. Bryson, Blanton Street	34.00
J. S. Foster, Phifer	26.00
A. J. Gilliam	32.32
R. N. Brookshire, Brookshire Street	52.00
H. H. Justice, Hillside Street	19.34
W. W. Goldsmith	

5. That under and by virtue of the charter of the city of Asheville all persons owning real estate in said city are required, at the discretion of the mayor and board of aldermen of said city, and at their own expense, to connect their said property, whether improved or unimproved, with the sewers of said city, and by virtue of said authority the said city of Asheville has compelled the plaintiffs above named to connect their said property with said sewers.

6. That the property of the plaintiffs above mentioned, and all other property of the plaintiffs situate in the city of Asheville, is annually taxed to pay the interest of said bonds which were issued to raise money to lay the sewers hereinbefore referred to and mentioned in paragraph 3 of this complaint; and in addition to that, the property of the plaintiffs has been subjected to a claim of lien in favor of said city on account of the sewers laid in the streets on which the plaintiffs' said properties abut, but that none of the property situated on the streets mentioned in paragraph 3 of this complaint has been assessed for sewers laid on said streets, but the sewers laid in front of said property and used by said property were paid out of the general funds of said city and by taxation on the property of these plaintiffs, as well as on the property of all other persons in the city of Asheville. That the plaintiffs (66) are advised and believe that said alleged claim of liens for sewerage assessments on their property and on all other property situated in the city of Asheville on which a lien is claimed for sewerage under the same conditions are absolutely null and void, contrary to the Constitution of the State of North Carolina, and contrary to the Constitution of the United States, contrary to common reason and common justice, unequal in the burdens which it authorizes the mayor and the board of aldermen to impose upon property in said city, unreasonable, unjust, and oppressive. That the plaintiffs hereto are in most instances humble people, and their property is of very little value as compared with the most valuable property in said city; and when considered per front foot on an average would not be worth one-tenth the amount of the average value per front foot of the property mentioned in paragraph 3 of this complaint, as these plaintiffs verily believe. And the plaintiffs further allege that said assessments for sewers in front of their said property are for amounts much larger than any actual benefit conferred upon the property by the construction of such sewers, and that said assessments were irregularly and unlawfully made and levied, and are, therefore, null and void.

7. And the plaintiffs further allege that, as they are advised and believe, the said assessments and the statute under which they are levied are illegal, unconstitutional, and void; that the said statute is discriminatory and if enforced against these plaintiffs would deprive them of

all their property without due process of law and deprive them of the equal protection of the laws; that said statute, as they are advised and believe, is contrary to the Constitution of the State of North Carolina, and is therefore void; that said alleged statutes constituting a part of the charter of the city of Asheville, which are attempted to be enforced in this cause, and the assessments levied thereunder, are contrary to the Constitution of the United States, and especially the fourteenth amendment of said Constitution, and if enforced would deprive these plaintiffs of their property without due process of law and deprive them of the equal protection of the law, and the plaintiffs hereby especially plead the said Constitution of the United States and the amend-
(67) ments thereto and rely upon the same for protection in this cause.

Wherefore, the plaintiffs pray:

1. That an injunction be issued enjoining and restraining the city of Asheville from enforcing said assessments or collecting the money claimed by it on account thereof.

2. That said assessments be set aside and declared null and void.

3. That the plaintiffs have all such other and further relief as they may be entitled to and to the court may seem meet.

The defendant denies that it has exceeded its powers, and alleges, in its answer, that said assessments were regularly and legally made under the provisions of its charter.

A map of the sewerage system in Asheville is made a part of the record, which shows that the main sewer lines, into which other sewers empty, were constructed with the money derived from the bond issue referred to in the complaint.

The provisions of the charter of the defendant, material to this inquiry, are:

"SEC. 179. Said board of aldermen shall, from time to time, lay, build, and construct in said city such system of waterworks, water pipes, sewerage and sewer pipes and extension of the same as to it may seem advisable, or cause the same to be so laid, built, and constructed, and shall keep the same in proper condition and repair, with proper connections, and make all necessary provisions for so doing, and shall control and regulate such system and every part thereof, and may require the owner or owners of any improved lots in said city on any public street or alley where such water and sewer pipes have been laid, or are conveniently accessible, or on any line of pipes, to connect such lot with such sewer and water pipes in the manner and at the places designated by said board of aldermen, upon like notice, terms and conditions as are hereinbefore provided for paving sidewalks; and upon failure of the owner or owners to so connect the same within the time in such notice required, said board of aldermen may enter upon such lot and make such

connections and charge the costs thereof against said lot in the same manner as hereinbefore provided in the case of sidewalks, (68) and such costs so charged shall be collected and shall constitute a lien upon such lot in the same manner and to be enforced in the same manner and with like powers and privileges as is hereinbefore provided in regard to sidewalks. And in all cases where a sewer shall be laid by or under the authority of said board of aldermen in any street in said city, the costs and expense of laying and constructing same shall be assessed against the property abutting on each side of said streets, as well as against all property within the radius of benefit arising from such improvements, though not actually abutting thereon; the property liable to assessment hereunder and the apportionment of the costs and expense of said improvement against the same in case of disagreements between the owner or owners thereof and said board of aldermen as to the pro rata part of said costs and expenses which should be assessed against any piece or parcel of property benefited as aforesaid, to be determined by a jury of seven freeholders of said city unconnected by consanguinity or affinity with any of the persons supposed to be affected by said improvements, and summoned to pass upon said questions above mentioned, by any policeman of said city upon writ to him directed by the mayor under the seal of said city, commanding that such be done, and succinctly describing the duties to be performed by such jury. Each juror shall be sworn by the mayor or any other person competent to administer oaths in this State, to faithfully and impartially execute the duties of his office before entering upon the performance thereof. Each member of said jury summoned as aforesaid shall repair to the mayor's office at a date and hour to be named in the mayor's said writ, not more than five days after the date of the same, for the purpose of being sworn as hereinbefore required. Upon the assembling of said jury at the mayor's office, any person summoned as aforesaid, upon excuse offered satisfactory to said mayor, may by him be excused from further service; and it shall be the duty of the mayor to require any policeman of the city to forthwith summon another person having the qualifications hereinbefore described to serve upon said jury in the place and stead of the juror so excused by the mayor. Immediately after being sworn as aforesaid, said jury as finally constituted shall proceed without (69) unnecessary delay to view the street and section in which said improvement has been or is proposed to be made, and all the property deemed by them to be beneficially affected thereby as hereinbefore described, and shall within a reasonable time thereafter, not exceeding five days, and after due consideration thereof, make up their report, a majority concurring therein, in which shall be generally described each piece of property deemed by them to be beneficially affected by said

improvement, together with the amount of the special benefit thereto arising from such improvement, and giving also the name or names of the supposed owner or owners thereof. In case of inability of said jury, with a majority concurring, to agree upon the special benefit to any piece or parcel of land as aforesaid arising from such improvements, after being together and considering same for twenty-four hours, they may be excused from further consideration thereof by said mayor, and shall file their report as hereinafter required concerning the pieces or parcels of land upon which they shall have been able to agree; and the mayor may, by writ, as hereinbefore described, immediately require another jury of seven persons, possessing the same qualifications as said first mentioned jury, to be summoned and qualified as aforesaid, who shall forthwith proceed, in the manner and within the time hereinbefore mentioned, to pass upon and determine the questions left undetermined by said first mentioned jury, and to file their report in the manner and within the time herein required in cases where there is no disagreement upon the part of the jury. After making up their report as herein required, said jury shall forthwith file the same with the city clerk of Asheville, who shall submit it to the board of aldermen at their next regular meeting after the day on which the same is filed as aforesaid, for their action. Said board of aldermen shall, at said meeting or at any regular meeting thereafter, not exceeding twenty days from the date of the submission of the same, require the city clerk to publish a notice of not less than twenty days in some newspaper published in said city and of general circulation therein, to the effect that said jury has made
(70) its report and prorated and assessed the costs and expense of said improvement (which shall be described generally) against the property specially benefited thereby, naming, where possible, the owners thereof, or the party in whose name said property may be listed for taxation, or in case the name of the owner cannot be ascertained, and said property is not listed for taxation, then the name of the party occupying the same, if any, and admonishing all persons interested therein, particularly those named in said notice, that said report has been filed with the city clerk, and they and each of them are required to be and appear at a regular meeting of said board of aldermen, to be specified in said notice, and to be held not less than ten days after the date of the expiration of said notice, and show cause, if any should exist, why said report should not be approved and confirmed by said board of aldermen, and at such meeting said board of aldermen shall take up and consider the report of said jury, and hear any competent evidence from any person interested in the property affected thereby touching any matters covered by said report, and to that end said board of aldermen are hereby constituted a court with power to send for persons and papers, to provide

for the examination of witnesses, and to punish witnesses or others, in proper cases, for contempt of court. After hearing evidence as aforesaid, and duly considering said report, or, in case no objection is made, after duly considering said report, said board of aldermen may approve, correct, amend, modify, or reject the same, or any item therein, as to them may seem just and proper, and said report or said corrected, amended, or modified report, as the case may be, shall then be entered in full in a book to be provided for that purpose by the board of aldermen, and to be entitled 'Record of Sewer Liens,' which book shall be properly and accurately indexed, as near as may be, in the name of the owner of the property affected by said improvement, so as to enable the public, to whom said book, with its index, shall always be open and accessible during business hours, to readily ascertain what property may be affected by said assessment and the amount of said assessment against each piece or parcel of property. Any aggrieved party may appeal from the final determination of said board of aldermen with (71) respect to said report, or any item therein, as aforesaid, within ten days after the date of the registration thereof, as above provided, to the next term of the Superior Court of Buncombe County, beginning more than ten days after the date of such appeal, by serving notice of appeal upon the mayor of said city, and specifying therein the particulars in which he considers himself aggrieved by such determination of such board of aldermen. On any such appeal the appellate court shall have power to increase, affirm, or diminish the amount of the item appealed from, but not to adjudicate the necessity of the improvement, and such appeal shall in no wise hinder, obstruct, or delay said improvement. The amount of any special benefit or enhanced value so assessed against any premises by the board of aldermen of said city, or an appeal adjudged against the same, shall upon such final determination of said board of aldermen, with respect thereto, in case no appeal is taken therefrom, or upon final judgment of the court in case of any such appeal, be and become a lien in favor of said city, on said property on which it has been so assessed or adjudged, as of the time of such final determination on the part of the board of aldermen, and shall be paid to the city in three equal annual installments, one, two, and three years respectively, together with interest on each installment at the rate of 6 per cent per annum from said date. If any installment shall remain unpaid for thirty days after its maturity, all installments then unpaid shall become due, and the property and premises so assessed or charged shall be sold for the payment of the same, and of the expenses of such sale and costs, by the tax collector of said city, under the same rules, regulations, restrictions, rights of redemption and other provisions as are prescribed in this charter for the sale of real estate for unpaid taxes. The installments of the

assessments herein mentioned, or any part of same, may be assigned and transferred by said city either absolutely or conditionally, as to the board of aldermen may seem best."

The plaintiffs resist the collection of the assessments because:

(72) "1. It (the charter) requires all of the cost and expense of the sewers to be assessed against private property.

"2. Because, in considering the benefits to be derived by the property adjacent to the sewers, the statute does not provide that the jury shall take into consideration the fact that the sewers in all other parts of the city were laid out of the general funds, and that the particular property in question is subject to taxation to pay for said sewers laid out of the general funds.

"3. This statute is subject to the same objection and to the same defects which this Court found to exist in section 65, chapter 100, Private Laws 1909, as pointed out in the case of *Asheville v. Trust Co.*, 143 N. C., 360, which are that no taxing district is established within which the improvement is to be made and special benefits assessed."

Martin, Rollins & Wright for plaintiffs.
J. Frazier Glenn for defendant.

ALLEN, J. The charter of the defendant expressly provides that only such property as is specially benefited by the construction of sewers shall be liable to assessment, and it is not alleged in the complaint that the assessments against the property of the plaintiffs exceed the benefits.

This being true, the first objection of the plaintiffs to the corporate action of the defendant is fully met by the cases of *Spencer v. Merchant*, 125 U. S., 345; *R. R. v. Decatur*, 147 U. S., 190; *Paulsen v. Portland*, 149 U. S., 30; *Baumann v. Ross*, 167 U. S., 589; *Asheville v. Trust Co.*, 143 N. C., 366.

In the *Spencer case* the Court says: "The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of the legislative discretion"; and this is approved in the other cases cited.

The second objection of the plaintiffs is not that the jury did not consider the fact that the property of the plaintiffs was subject to taxation to pay interest on bonds issued to construct sewers in other

(73) parts of the city of Asheville in estimating benefits, but that the statute did not require this to be done. A section of the same charter, relating to paving, with similar provisions as to assessments, was

sustained in *Schank v. Asheville*, 154 N. C., 40, and in none of the statutes we have examined, and which have been approved, have the elements entering into the estimation of damages and benefits been defined, and for the reason that they cannot always be foreseen.

In *Paulsen v. Portland, supra,* an ordinance was approved which required assessments for sewers to be made on property "directly benefited," without defining what should be taken into consideration, and it was held: "A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. Notice by publication is a sufficient notice to the taxpayer in proceedings for the assessment of a tax on his property for the construction of a sewer. If provision is made for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

It was also said in *Raleigh v. Peace,* 110 N. C., 40: "The power to make such assessments must be clearly authorized by the Legislature, but it is not necessary, and 'of course not to be expected—indeed, it is scarcely conceivable—that the Legislature should, in conferring authority upon local bodies, specify in minute detail the incidents of the power. The courts generally hold that necessary incidental and subordinate powers pass with the grant of the principal power. Any other ruling would make it practically impossible to frame statutes capable of reasonable enforcement. In matters of street improvements and local assessments, as in kindred matters, it is generally held that a power clearly conferred in general words will carry all the incidental authority essential to the execution of the power in ordinary and appropriate methods.'"

In the charter of the defendant ample opportunity is given to the owner to challenge and review charges against his property, and no claim is made by either of the plaintiffs that he did not have (74) notice of the proceedings or that he was refused a hearing.

The last position of the plaintiffs would find support in *Asheville v. Trust Co., supra,* if it appeared that no taxing district had been laid off; but while the case referred to holds that the designation of the district is necessary, it is also there decided that this may be done in the legislative act, or by the city under the power to make the improvements and to levy the assessments.

The presumption is in favor of the regularity of the proceedings, and the presumption is strengthened by the fact that the plaintiffs have made no complaint until the improvements, which enhance the value of the property, have been completed.

The powers of municipal corporations as to assessments for public

improvements are fully discussed and the authorities reviewed by *Justice Hoke* in the recent case of *Tarboro v. Staton*, 156 N. C., 508.

Upon a review of the record, we find no error.

Affirmed.

CRESCENT LIQUOR COMPANY v. JOHNSON, VAUGHAN & CO.

(Filed 11 December, 1912.)

1. Intoxicating Liquors—Contracts—Illegal Consideration—Enforcement.

The courts will not enforce a contract made in violation of its own laws, and checks given in payment for intoxicating liquors purchased in North Carolina in violation of our prohibition laws are not collectible in our courts.

2. Same—Conjectural Evidence—Liquor Dealers—Checks—Burden of Proof.

When the payment of checks is resisted on the ground that they were given for the purchase of intoxicating liquors in North Carolina prohibited by our prohibition laws, the burden is on the defendants to show that they were so given, and mere conjectural circumstances or probabilities are not evidence sufficient; and no presumption of illegality arises from the fact that the plaintiffs were liquor dealers, or that the defendants kept a restaurant and dealt in "soft drinks," etc., and not in intoxicants.

(75) APPEAL by plaintiff from *Long, J.*, at April Term, 1912, of BUNCOMBE.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

W. P. Brown and J. D. Murphy for plaintiff.
No counsel for defendant.

WALKER, J. This action is brought to recover the amount of three checks given by defendants to the plaintiff, one dated 7 January, 1911, for $100, another dated 24 January, 1911, for $85, and still another dated 7 February, 1911, for $98. The first was dated at Canton, N. C., and the second at Asheville, N. C. They were drawn on the Bank of Canton to the order of the plaintiff. The jury returned the following verdict:

1. Did the defendant firm execute and deliver the checks and for the amounts alleged and at dates alleged in the complaint? Answer: Yes.

2. Was the contract made between the plaintiff and defendants made in North Carolina, as alleged in the answer? Answer: Yes.

3. Were said checks executed and delivered and the contract made in

this State, for the sale of intoxicating liquors in violation of the laws of North Carolina, as alleged in the answer? Answer: Yes.

Judgment was entered for the defendant, and plaintiff appealed.

It appears on the face of one of the checks that Johnson, Vaughan & Co. were dealers in "hot and cold lunches, soft drinks, fruits, cigars, cigarettes, and tobacco." The defense was that the checks were given for the sale of liquor, contrary to our statute prohibiting the sale of liquor in the State, and upon the principle that where a contract is entered into by the parties for the purpose of doing something that is prohibited by law, it is not enforcible, as the law will not lend its support to a claim founded upon a violation of itself. Clark on Contracts (2 Ed.), p. 265, and cases in Note 38; *Vinegar Co. v. Hawn,* 149 N. C., 355; *Kelly v. Courter,* 1 Okla., 277; Broom's Legal Maxims, 108; (76) *King v. Winants,* 71 N. C., 469; *Oscanyan v. Arms Co.,* 103 U. S., 261; *Ewell v. Daggs,* 108 U. S., 143; *Aiken v. Blaisdell,* 41 Vt., 655. In *Holman v. Johnson,* Cowp., 341, *Lord Mansfield* said: "The principle of public policy is this: *ex dolo malo non oritur actio.* No court will land its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appear to arise *ex turpi causa,* or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

There is no element of interstate commerce in this case, as the entire transaction was conducted in this State. The simple and single question is, whether there was any evidence that the checks were given for the price of liquor sold by the plaintiff to them, and we think, after a careful examination of the testimony in the case, that there was not. We have settled upon the principle, in regard to the probative force of evidence, and when considering the question whether there is any legal evidence of the fact in issue, as expressed in *S. v. Vinson,* 63 N. C., 335, and approved in numerous more recent decisions: "It may be said with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." See *Byrd v. Express Co.,* 139 N. C., 273; *Young v. R. R.,* 116 N. C., 932; *Brown v. Kinsey,* 81 N. C., 245; *Cobb v. Fogalman,* 23 N. C., 440; *Sutton v. Madre,* 47 N. C., 320; *Pettiford v. Mayo,* 117 N. C., 27; *Lewis v. Steamship Co.,* 132 N. C., 904. We said in *Campbell v. Everhart,* 139 N. C., 503: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of

fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does (77) exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury," citing authorities.

In this case there was no legal evidence that the checks were given for for the price of liquor, nor was there any evidence that liquor was sold by the plaintiff to the defendant in this State. The only fact upon which the defendants can rely, and of which there was proof, is that the plaintiffs were liquor dealers. There is no presumption of law or fact that a check or note payable to a man, who may be engaged in the sale of liquor, was given for the price of liquor. That fact might form the basis of a conjecture or a guess that it was, but there are so many other things it could be given for, that it would be extremely unsafe to rely upon such a circumstance as proof of the fact. The mere fact that a note is given to a merchant is no evidence that it was given for articles of merchandise, or to a horse dealer, that it was given for a horse. It is also argued by the plaintiffs that as one of the checks showed, on its face, that defendants were engaged in the business of keeping a restaurant and sold "hot and cold lunches, soft drinks, fruits, cigars, cigarettes and tobacco," that it constitutes evidence of the sale of liquor, but we think not. It rather strengthens the plaintiff's contention, for defendants were not retail dealers in liquor; they did not sell liquor by the small measure, but dealt, as it appears, in other kinds of merchandise. Without going over the evidence in detail, we may say generally that there is no proof upon which anything more than a mere guess could be based, as to the main and essential fact to be established.

The court, therefore, erred in submitting the case to the jury, with an instruction predicated upon the existence of evidence sufficient in law to prove the fact that the notes were given for liquor. He should have charged the jury that there was no evidence of such fact, and then directed them to return a verdict for the plaintiff. This necessitates a

New trial.

(78)

ROSE STYRON v. ATLANTIC AND NORTH CAROLINA RAILWAY COMPANY AND THE TOWN OF MOREHEAD CITY.

(Filed 14 December, 1912.)

1. Cities and Towns—Streets and Sidewalks—Negligence—Evidence—Questions for Jury.

In an action against a city for damages for a personal injury alleged to have been negligently inflicted, there was evidence tending to show that a city's street crossed a ditch which had long since been dug by a railroad company from its right of way and kept open, with the permission of the city, for a number of years; that the city had maintained a bridge over this ditch, but had permitted it to become in disrepair, which, at the time complained of, was not more than an 8-foot plank without railing and no lights nearer than 100 yards, and had been generally used by people to walk across for more than ten years; that plaintiff, while attempting to cross after sundown, was thrown by the plank into the ditch and injured: *Held*, that a motion to nonsuit should not be granted.

2. Cities and Towns—Negligence—Release—Fraud—Instructions for Jury.

A release made by an ignorant and illiterate person of all demand against a city on account of a personal injury alleged to have been negligently inflicted by it, which was not read over to the injured party, who was told by the city officials she had no claim against the city, whereupon she made her mark on the release, the consideration therefor appearing to be inadequate, is sufficient evidence of fraud in its procurement to be submitted to the jury.

APPEAL by defendant from *Foushee, J.*, at March Term, 1912, of CARTERET.

Civil action. At the conclusion of the evidence the court sustained a motion to nonsuit the plaintiff as to the defendant, the railroad company. Plaintiff excepted. The court overruled the motion to nonsuit made by defendant town of Morehead City, and submitted these issues to the jury. The defendant Morehead City excepted.

1. Was the release set out in this answer of the defendant town secured by undue influence and fraud, as alleged? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant town, as alleged? Answer: Yes. (79)

3. Was plaintiff guilty of contributory negligence, as alleged? Answer: No.

4. What damages, if any, has the plaintiff sustained by reason of the alleged negligence? Answer: $325.

From the judgment rendered, both the plaintiff and the defendant Morehead City appealed.

Abernethy & Davis for plaintiff.
E. H. Gorham, Charles R. Thomas for defendant Morehead City.
J. F. Duncan and L. I. Moore for A. and N. C. Railroad Company.

THE DEFENDANT MOREHEAD CITY'S APPEAL.

BROWN, J. The plaintiff excepted and appealed because his Honor sustained the motion to nonsuit as to the defendant railroad company. This appeal has been heretofore disposed of early in the present term, and the judgment of the Superior Court affirmed.

The defendant Morehead City appeals, and the substance of its contentions is that in no view of the evidence is it liable to the plaintiff.

The defendant's officers evidently thought the town was liable, for shortly after plaintiff was injured they procured her to execute a release in these words: "In consideration of $25, I hereby release the town of Morehead City from all liability," etc.

The plaintiff testified that she is ignorant and cannot read and write; that the release was not read over to her; that the officials told her she had no claim against the town, and that she made her mark; that $16 of the $25 was paid the doctor, and she received only $6 in cash; and that $2 went to pay some money that had been loaned her.

The defendant city offered evidence in contradiction.

The assignments of error raise no questions of evidence, and we think the matter was properly left to the jury by the court.

Upon the question of the liability of the defendant city for neg-
(80) ligence, we think the motion to nonsuit was properly denied.

The plaintiff offered evidence tending to prove that she was injured crossing a ditch on a public street of defendant. This ditch was opened many years ago by the railroad company from its right of way to the sound, by permission of defendant. The evidence further shows that a street crossed this ditch and that defendant city maintained a bridge across it; that the street and bridge have been in general use twenty years; that the street was opened up by the city and is called Evans Street, and has been worked by the city for twenty-one or twenty-two years.

There is testimony tending to prove that the city kept up this bridge and that at time plaintiff was injured it consisted of "nothing more than a little bridge, an 8-foot plank"; that there was no railing to it, and no light nearer than 100 yards, and that the bridge was used generally by people to walk across for more than ten years.

Plaintiff testifies she attempted to cross this bridge after sundown in October, 1909, when the plank threw her into the ditch and crippled her; that there was no railing nor lights and nothing to keep her from falling into the ditch.

In our opinion, the evidence of negligence was amply sufficient to justify his Honor in submitting the issue to the jury. *Bunch v. Edenton*, 90 N. C., 431; *Russell v. Monroe*, 116 N. C., 720; *Fitzgerald v. Concord*, 140 N. C., 112.

The defendant Morehead City will pay all the costs.

No error.

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(81)

MARY M. SPEIGHT v. SEABOARD AIR LINE RAILWAY.

(Filed 4 December, 1912.)

1. Instructions—Construed as Whole—Objectionable in Part.

The charge of the judge to the jury must be construed as a whole, and one part in connection with the other parts of the charge; and objectionable parts standing alone will not be held for reversible error if the entire charge is correct.

2. Instructions—Negligent Killing—Measure of Damages—Expectancy—Mortuary Tables—Earning Capacity—Evidence.

In this action to recover damages for the alleged wrongful killing of plaintiff's intestate, the charge of the court is approved on appeal, as to the evidence of intestate's expectancy from the mortuary tables, the weight the jury should give them, and how they should consider the testimony of the intestate's earning capacity, illustrating his meaning from the evidence, and as to finding by deducting his expenses, etc., the net present loss his negligent killing has caused to his estate.

3. Same—Arguments to Jury—Corrections—Appeal and Error.

In this action to recover damages for the negligent killing of plaintiff's intestate, wherein defendant's counsel argued to the jury that evidence of the intestate's negligence should be considered upon the issue as to the measure of damages, the judge, in undertaking to correct any erroneous impression made thereby, properly instructed the jury that they should not consider the negligence of the intestate under that issue, and that evidence of his conduct, character, and habits were only relevant on the question of his earning capacity, and further *Held* that the charge was not to plaintiff's prejudice.

4. Instructions—Construed as a Whole—Negligent Killing—Measure of Damages—Expectancy—Earning Capacity—Appeal and Error.

When damages are sought for the negligent killing of plaintiff's intestate, their measure should not be determined conclusively upon his earning capacity at the time of his death; and while the charge of the judge in this case, by the use of the words, "what he was making," if taken alone, may be objectionable, it is not held for reversible error in connection with other pertinent parts of the charge, that evidence of intestate's habits, etc., was to aid the jury in determining whether he was

industrious and would be constantly employed; that the mortuary tables were evidence only of his expectancy, and that the jury must ascertain from all the evidence what his income would be.

5. Instructions — Negligent — Killing — Illustrations by Court—Appeal and Error.

After illustrating from the mortuary tables in evidence, and testimony as to the intestate's earning capacity, in an action to recover damages for his negligent killing, it appears that the judge carefully instructed the jury that they must not accept the figures named, as they might be incorrect, and that they were used merely as an example: *Held*, not an expression of opinion upon the evidence, and no error.

6. Instructions—Negligent Killing—Measure of Damages—Expenses—Witnesses Interested.

Upon the issue of the measure of damages, in an action to recover for the intestate's alleged negligent killing, and to find the net loss occasioned by the wrongful death, the mother of intestate testified that he was put to the expense for his washing, for she did that for him: *Held*, it was proper for the judge to explain to the jury that the interest of this witness should be considered, and the charge, upon the evidence in this case, is approved.

7. Judgments—Contingencies—Agreements—Appeal and Error—Procedure.

In this action for damages for the alleged negligent killing of plaintiff's intestate, a certain part of the judgment ordering the plaintiff's attorneys' fees be paid by the clerk upon the parties entering into a certain written agreement, is *Held* improper and stricken out on appeal.

APPEAL by plaintiff from *Peebles, J.*, at July Term, 1912, of
(82) RICHMOND.

This is an action to recover damages for the negligent killing of the plaintiff's intestate.

The jury returned the following verdict:

1. Was the plaintiff's intestate, Arthur Speight, injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, by his own negligence, contribute to his own injury and death, as alleged in the defendant's answer? Answer: Yes.

3. If so, notwithstanding the contributory negligence of the plaintiff's intestate, could the defendant, by the exercise of ordinary care, have avoided the injury and death? Answer: Yes.

4. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,500.

Judgment was entered upon the verdict, and the plaintiff ap-
(83) pealed, upon the ground of errors on the trial of the fourth issue.

The charge of his Honor on the fourth issue was as follows:

"Now, if you answer the first issue and the third issue 'Yes,' then you will come to the fourth issue, 'What amount of damages, if any, is plaintiff entitled to recover of the defendant?' In respect to something said in regard to deducting some damages from your verdict for the reason that the intestate was negligent in getting out on that track, that is not the law in this case, and you must not consider his negligence at all. (The plaintiff is entitled to recover whatever the next of kin lost by the death of the intestate, and it does not make any difference whether the boy was a good boy, a bad boy, a negligent boy, or hard-working. This evidence is simply to give you an idea as to the capacity of the man to earn money. If a bad man could earn as much as a good man, his next of kin would lose just as much. Those matters are just simply put before you in order that you might determine whether the deceased might be constantly employed and be an industrious employee.) The rule laid down by the Supreme Court is that you must ascertain as best you can how long the deceased would have lived if he had not been killed. In order to do that, the statute says you can introduce and consider the mortuary tables, because those tables are calculated by insurance people who have studied the matter thoroughly, and they have calculated with a view to try to find how long a man is expected to live when making calculation for insurance, and the Legislature has adopted that; and the mortuary tables say that where a man is 18 years old he is expected to live 43½ years longer, making him 61 years old, I believe. Now, that is not an iron-clad rule—not one you have got to be governed by absolutely. (It is to aid you in coming to a conclusion as to how long the deceased would have lived. In coming to that conclusion, it is your duty to take into consideration his habits, as to health, sobriety, etc.) You are not bound to find that he would have lived 43½ years longer, or that he would not have lived longer than that. You may find that he would have lived a longer or a shorter time. (Then after you determine how long he would have lived, you must ascertain as best you can, from all the evidence, what his income would be a year, then take his gross income, what he was making, and then deduct what his personal expenses would likely be, and take the expenses from his annual gross income, and (84) the balance would be the net earnings for one year. (Now, upon that subject there are two witnesses, one for the plaintiff, saying it would cost $35, one saying it would not cost him anything. Mrs. Speight said she did his washing, etc., but as a matter of law that is not the rule, as no one can tell how long she would continue to do that. You are not to be governed by what somebody else gives him.)"

His Honor then made a calculation and said:

"Now, of course, you are not bound to find that he would work 365

days in the year, never be sick, or have doctor's bills. These are all matters for you; the court cannot help you about that. (The evidence is, he was getting $36 per month, and I am taking it as an example to explain to you how the matter is done. You must not take what I took here, as the figures I have used might be incorrect. I divide the difference between the two witnesses—one said $35 per month, and one said nothing—and I divide it and put it down at $15 per month as the net income after paying all personal expenses.) As I said before, this is just taken as an example to explain to you how the matter is done. You are not to conclude that I have expressed any opinion as to what you ought to find. As I said before, you are not bound to find that he would live 43½ years; you may find that he would live a longer or a shorter time. Take everything into consideration and find out as best you can how long he would have lived and what his personal expenses would be per year. (His mother said he did outside work to pay for his washing and his board; cut wood, drew water. When you go to consider her testimony, it is your duty to consider the interest which she has in the result of this suit. According to the law, prior to 1868 in civil cases, and 1881 in criminal cases, evidence of parties interested in the suit could not go before a jury at all; the law assumed that they were so prone to be biased in their own interest that they were not allowed to testify at all. That law was very properly changed, and now anybody interested in the result of the suit, whether criminal or civil, can go upon the stand and testify. But it is your duty to carefully consider (85) the testimony of the plaintiff and ascertain as best you can what influence the interest she has in the suit would have upon the truthfulness of her testimony; and take into consideration all the testimony.) If you find that she told the truth, then you must give to her testimony the same faith and effect that you would to the testimony of any disinterested witness. (The first young man who said his expenses would be $35, that was an estimate of his; the plaintiff cannot ask you to say he told a lie, because as the plaintiff's witness, she could not impeach him; you can take his testimony for what it is worth.)"

The plaintiff excepted to the portions of the charge in parentheses.

Douglass, Lyon & Douglass and Lorenzo Medlin for plaintiff.
W. H. Neal and Murray Allen for defendant.

ALLEN, J. If we were permitted to consider the portions of the charge excepted to by plaintiff, alone and not in connection with other parts of the charge, we might conclude there was prejudicial error; but we can not do so.

"The charge and every part thereof is given to the jury for their instruction and guidance, and they *must* consider it as a whole. They have

no right to select such parts as suit themselves and reject the remainder, nor can counsel be permitted to do so upon an appeal to this Court. Such a course would be grossly unfair to the trial judge and would make the ultimate determination of causes depend more upon the skillful fencing of legal swordsmen than upon the merits. It is entirely proper for the court to explain or even correct any proceeding portin of its charge, if in its opinion it is necessary to present the case fairly and fully. This is so well settled as scarcely to require the citation of authority. *Cowles v. Hall,* 90 N. C., 330, 333; *Lewis v. R. R.,* 95 N. C., 179, 188; *S. v. Keen, ibid.,* 646, 648." *Everett v. Spencer,* 122 N. C., 1011.

"In construing an instruction given by the trial judge, the entire charge will be examined and language excepted to read in connection with the context." *Liles v. Lumber Co.,* 142 N. C., 39.

The charge must be taken in its entirety, and not in "broken doses." *Wilson v. R. R.,* 142 N. C., 333. (86)

This principle has been approved in *Westbrook v. Wilson,* 135 N. C., 403; *S. v. Malone,* 154 N. C., 200; *Brazille v. Barytes Co.,* 157 N. C., 454, and in numerous other cases, and when applied to the charge before us, we find no reversible error.

The rule stated by his Honor for the admeasurement of damages in the event of death was in accordance with precedent. *Pickett v. R. R.,* 117 N. C., 616; *McLamb v. R. R.,* 122 N. C., 862; *Mendenhall v. R. R.,* 123 N. N., 275; *Watson v. R. R.,* 133 N. C., 188; *Gerringer v. R. R.,* 146 N. C., 32.

The charge in the *Mendenhall case* has been specially commended, and in the *Watson case* it was suggested that it would not be improper to illustrate the rule by calculations.

The language criticised in the first exception was favorable to the plaintiff. One of the counsel for the defendant had argued before the jury that some damages ought to be deducted on account of the negligence of the intestate in going on the track, and his Honor undertook to correct any impression made against the plaintiff by the argument, by telling them that they could not consider the negligence of the plaintiff under the fourth issue, and that evidence of his conduct, character, and habits were only relevant on the question of his earning capacity.

The charge as to the effect of the mortuary tables is fully sustained by authority. *Russell v. Steamboat Co.,* 126 N. C., 967; *Sledge v. Lumber Co.,* 140 N. C., 461.

It would have been erroneous to instruct the jury that the gross income of the deceased was to be ascertained upon the basis of his earnings at the time of his death, and the use of the language, "what he was making," the subject of the third exception, might lead to the conclusion that

he intended to do so, but when considered in connection with the context, it could not have misled the jury.

His Honor had instructed the jury that evidence of habits, etc., had been introduced in order that the jury might determine whether the deceased would be constantly employed and industrious; that the mortuary tables and evidence of habits, health, and sobriety were introduced for the purpose of ascertaining his expectancy, and immediately pre-
(87) ceding the language complained of, that they must ascertain from all the evidence *what his income would be.*

The jury were not instructed not to consider the evidence of Mrs. Speight, but that it was not controlling, and that the rule was not what some one would give him, stating clearly that the net income was to be ascertained by deducting the personal expenses of the deceased from his gross income during his expectancy, and that the plaintiff was entitled to recover the present value of his net income.

The plaintiff does not challenge the correctness of his Honor's calculations nor the mathematical rule adopted by him, but contends that he usurped the powers of the jury, and in effect expressed an opinion on the weight of the evidence.

An examination of the charge shows that the jury were carefully instructed that they must not accept the figures named, as they might be incorrect, and that they were used merely as an example.

It was proper to explain to the jury that the interest of Mrs. Speight should be considered, and we find no expression of opinion in the last clause of the charge excepted to.

There is an exception to evidence in the record, but his Honor states that this exception was not entered at the trial.

There is nothing in the record which justifies or supports that part of the judgment providing that, "In case Willis Speight and plaintiff file with the clerk a written agreement as to a reasonable fee for plaintiff's attorneys, then the clerk will pay over to said attorneys said fee. If said Willis Speight and plaintiff can agree upon a division of the balance, then the said clerk is authorized to pay it out to them," and it is ordered that it be stricken out.

Modified and affirmed.

Cited: Herndon v. R. R., 162 N. C., 318, 324; *Lynch v. Mfg. Co.*, 167 N. C., 102.

(88)

ROBERTA MANUFACTURING COMPANY v. ROYAL EXCHANGE ASSURANCE COMPANY.

(Filed 20 December, 1912.)

1. Insurance, Fire—Delivery—Intent.

The intent of the parties as to whether policies of fire insurance were to be valid and subsisting contracts between them will control the question of delivery, and their manual delivery to the insured, or to the parties authorized to represent him, is *Held* not to be essential in this case to make them binding upon the companies.

2. Same—Manual Delivery.

When a policy of fire insurance is placed by the insurer into the hands of the authorized agent of the insured, and nothing remains but to make delivery to him, without any further action on the part of the insured being necessary, except the mere formal act of receiving the policy, then the agent is presumed to hold the policy for the insured, and the contract is binding.

3. Insurance, Fire—Policy Contract—Principal and Agent—Renewals—Contracts—Acceptance.

A secretary of a manufacturing concern was also a partner in a local fire insurance agency designated as A, and as such obtained policies of insurance through his agency on the company's property, intending to substitute them for policies already issued and accepted in renewal by another agency, designated as B, and held the policies of agency A in his desk at the office of that agency, while endeavoring to get a better rate of insurance to meet that of agency B. In the meanwhile the property was destroyed by fire: *Held*, (1) the issuance of the policies by the agent, without the knowledge or consent of either party, was invalid; (2) it was necessary that the minds of the contracting parties agree in order to make a valid contract, and the policies of agency A being refused by the proper officer of the insured, superior to that of the secretary, and those in renewal of agency B being accepted by him, there was no valid contract which would put in force the policies of agency A, or make a binding contract on the companies represented by it.

4. Insurance—Policy Contracts—Consideration—Agreement as to Rates.

A contract is not enforcible if the contracting parties have not agreed upon the consideration to support it. Hence, when the subject of proposed insurance has been destroyed by fire pending the question of the amount of the rate to be charged, the policies are not binding upon the proposed insurer.

5. Insurance—Policy Contracts—Cancellation — Consent — Interpretation of Statutes.

While it takes the agreement of the minds of both parties to make a contract, it may be terminated by one of them if the contract so provides; and under the provisions of our standard form of fire insurance policies, "this policy shall be canceled, at any time, at the request of the insured, etc." (Revisal, sec. 4760), the policy terminates at once, or is

immediately canceled, upon the receipt by the insurer of the request of the insured to that effect, without the necessity for the consent of the insurer.

6. Same—Words and Phrases.

Our standard form of a policy of fire insurance provides, "This policy shall be canceled at any time, at the request of the insured, or by the company giving five days notice in writing of such cancellation." Revisal, sec. 4760: *Held*, either party to the contract may cancel the policies without the consent of the other, by following the provisions of the policy applicable; and *Held, further*, that the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled."

7. Insurance—Policy Contracts — Physical Cancellation — Interpretation of Statutes.

When the insured requests cancellation of policies of fire insurance of the insurer upon the statutory or standard form (Revisal, sec. 4760), the cancellation takes effect upon the insurer's receiving the request, without formal or physical defacement of the policy.

8. Insurance, Fire—Possession of Policy—Presumptions—Rebuttal—Appeal and Error.

The *prima facie* case of the possession by the insured of insurance policies covering loss by fire does not control on this appeal, and little importance is attached to it, as the facts herein rebut the presumption.

APPEAL by defendant from *Lyon, J.*, at March Term, 1912, of
(89) MECKLENBURG.

This is an action to recover upon divers policies of insurance, eleven in number, alleged to have been issued by the defendants to the plaintiff on its property, which was destroyed by fire on 5 December, 1910. Five of these policies were alleged to have been issued by
(90) the Royal Exchange Assurance Company and its four associates on 26 November, 1910, the said companies being, at the time, represented by C. N. G. Butt & Co., an insurance agency at Charlotte, N. C., and their policies have, by consent and for convenience, been called the "Charlotte policies," and will be so styled in the discussion of the case, and other policies, called the "Concord policies," and hereinafter styled as such, were issued by the insurance agency of John K. Patterson & Co., at Concord, N. C. E. F. White of Concord was a member of the insurance firm of John K. Patterson & Co., and also secretary and treasurer of the Roberta Manufacturing Company, plaintiff in this case. John C. Rankin was its president and S. M. Robinson was a director, and had joint control and management of the plaintiff's affairs with John C. Rankin. At the request of White, policies to the amount of $40,000 were made out by John K. Patterson & Co., and afterwards other policies to the amount of $20,000 were similarly made out by

them, and all of them handed to White, who placed them in the drawer of the desk which was in the office of Patterson & Co. Issues were submitted to the jury and answered as follows:

1. Were the Charlotte policies delivered to plaintiff by the Charlotte companies? Answer: Yes.

2. Were they accepted before the fire by plaintiff? Answer: Yes.

3. Had they been canceled at the time of the fire? Answer: No.

4. Were the Concord policies delivered to plantiff by the Concord companies? Answer: Yes.

5. Were they accepted by plaintiff before the fire? Answer: Yes.

6. Was E. F. White plaintiff's secretary and treasurer and also agent of the Concord companies when the Concord policies were written? Answer: Yes.

7. Did he so continue up to and after the fire? Answer: Yes.

8. Are the Concord companies estopped from setting up as a defense White's double agency at the time said policies were issued or accepted? Answer: No.

9. Did the Concord companies by their conduct or course of dealing prior to the issuing of these policies authorize their agents to issue these policies to plaintiffs through White, and thereby waive their right to defend on the ground that said policies were invalid be- (91) cause White was agent of both insurer and insured? Answer: Yes.

10. Were the Concord policies in force at the time of the fire? Answer: Yes.

The Concord companies made a motion to strike out the verdict on the fourth, fifth, ninth, and tenth issues.

Plaintiff gave notice of a motion that, if any part of this motion was sustained, it would move to strike out the answers to the sixth, seventh, and eighth issues.

The court sustained the motion of the Concord companies, and struck out the findings of the jury on the fourth, fifth, ninth, and tenth issues, and, on motion of counsel for the Concord companies, dismissed the action, as to them, under the statute. It also overruled plaintiff's motion for judgment against all the defendants, set aside the findings against the Concord companies for insufficiency of evidence to sustain the same, as matter of law and not as matter of discretion, and refused a new trial to the Charlotte companies on their motion. Judgment was rendered for the plaintiff against the Charlotte companies for the full amount sued for, and in favor of the Concord companies, dismissing said action as to them, with costs against plaintiff. Plaintiff and the Charlotte companies appealed.

Burwell & Cansler for plaintiff.

Tillett & Guthrie and A. C. King for Concord companies.

Osborne & Cocke and W. S. O'B. Robinson, Jr., for Charlotte companies.

WALKER, J., after stating the case: The decisive question in this case is, whether the Concord policies were delivered so as to become effectual as insurance contracts. Counsel for the Charlotte companies virtually, or at least tacitly, conceded, as we think very properly, that the Charlotte policies had been accepted by the plaintiff and were in force at the time of the fire which destroyed the insured property. If
(92) anything besides this frank admission were needed to show the fact, the letter of Mr. Griffith of the firm of C. N. G. Butt & Co. to S. M. Robinson, dated 17 December, 1910, and referring to the carbon copy of a letter from S. M. Robinson to E. F. White, dated 15 December, 1910, would be sufficient of itself to establish conclusively the delivery by C. N. G. Butt & Co. and the acceptance by the plaintiff of the Charlotte policies. In his letter, as we have said, Griffith refers to the inclosed carbon copy of Robinson's letter to White, in which Robinson, for himself and Rankin, and acting for the plaintiff, declines to accept the Concord policies, and notifies White to cancel them, "so as to leave the business in the hands of C. N. G. Butt & Co., where I find it rightly belongs." With reference to this statement, Griffith, in his letter to Robinson, approves what Robinson had said in his letter to White, in these words: I have read with much interest the carbon copy of letter to Mr. White. I am glad you have taken the position you have and that you will let the insurance remain with us. I return herewith letter as requted, together with bill. If it is not convenient to pay now, we will take care of same."

With this matter out of the way, we turn our attention to the delivery of the Concord policies. We attach no great importance to the fact that they remained in the actual possession of White, that is, in the drawer of the desk, from the time he got them from Patterson & Co. to the day of the fire and afterwards, for if they were intended by the parties to be valid and subsisting contracts of insurance, the manual delivery of them to the plaintiff, or to the party authorized to represent it, was not essential to make them binding upon the companies. "In the absence of any other evidence to show assent of the company to the making of a contract of insurance, delivery of the policy must be shown. But where a policy has been duly executed in compliance with an application on the part of the insured, so that the minds of the parties have fully met as to the terms and conditions of the contract, a manual delivery of the policy to the insured is not essential to render it binding

on the company." 19 Cyc., p. 603. If the policy has been put into the hands of the company's agent, to be delivered to the insured, and nothing remains but to make such delivery, without any further action on the part of the insured being necessary except the mere formal act of receiving the policy, then their agent is presumed to hold (93) the policy for the insured and the contract is complete and binding. *Insurance Co. v. Colt,* 20 Wall., 200 (22 L. E., 4323, *Wheeler v. Insurance Co.,* 131 Mass., 1; *Dibble v. Assurance Co.,* 70 Mich., 1 (14 Am. St. Rep., 470); *Insurance Co. v. Meier,* 28 Neb., 124; *Morrison v. Insurance Co.,* 64 N. H., 137; *Hallock v. Insurance Co.,* 26 N. J. L., 268; *Machine Co. v. Insurance Co.*, 50 Ohio St., 549 (22 L. R. A., 768).

The fact that White had physical possession of the Concord policies, of course, throws light upon the other question, as to whether they had been issued by the Concord companies and accepted by the plaintiff. Our view of the case also eliminates another question, whether, if the Concord policies had been duly issued and accepted, the dual agency of White, who, in a measure, represented the plaintiff, and also the Concord companies, would have the effect of invalidating the policies. This brings us to consider whether the Concord policies had been delivered and were in force when the fire occurred. Looking at the entire evidence and considering it most favorably for the plaintiff, the indisputable facts of the case lead us irresistibly to the conclusion that there was no such delivery of the policies as the law requires to complete the contract of insurance and impose liability upon the companies.

It is, of course, true that a policy issued by an insurance agent, without the knowledge or consent of either party, is not valid. 19 Cyc., 625; *Insurance Co. v. Turnbull,* 86 Ky., 230. "To constitute any contract, there must be a proposal by one party and an acceptance by the other, resulting in an obligation resting upon one or both, or, in other words, there must be a promise." *Bailey v. Rutjes,* 86 N. C., at p. 520; Pollock on Contracts, 5. The property to be insured was worth $70,000. The Concord companies had before tried to get the insurance, but it was given to the Charlotte companies, C. N. G. Butt & Co., their agents, having procured better rates than were offered by the Concord companies. The policies issued by the Charlotte agency were (94) about to expire and renewals were issued and sent by C. N. G. Butt & Co. to the plaintiff. These policies, as we have seen, were accepted, and a controversy arose as to whether the plaintiff should keep them and continue the insurance with the Charlotte companies, or accept the policies of the Concord companies. Whether this should be done was not left finally to the discretion or judgment of E. F. White, the agent at Concord, but to the final decision or approval of Robinson or Rankin, the former being higher in authority than White, and Rankin

being in supreme authority. The whole evidence shows, without any doubt, that what Patterson and White did at Concord with reference to the policies did not effect insurance until submitted to Rankin, or to Robinson acting for him, and approved. The new insurance was to be substituted for that in the Charlotte companies, which was about to expire. It was not the purpose of the parties to over-insure the property or to doubly insure it, and John C. Rankin so testified. The evidence shows that the transaction between Patterson & Co. and White was merely preparatory to making an offer of the policies to Rankin, as the president and general manager of the plaintiff company, who had the final word, and whose superior authority White was bound to respect. It is perfectly apparent that White did not consider that he had effected insurance in the Concord companies, but that it all depended upon what Rankin would do in the matter. He was anxious to get the insurance for his companies, to be sure, because he had a pecuniary interest involved in the successful issue of the sharp competition started by him with C. N. G. Butt & Co. He endeavored to induce Robinson to return the Charlotte policies to C. N. G. Butt & Co. for cancellation, but this Robinson positively refused to do, stating in his letter that the plaintiff felt under obligations to Butt & Co. for what they had formerly done in the way of procuring insurance for it at a lower rate than White's company had offered, and rejecting the Concord policies, with a request that White have them canceled. Rankin
(95) united with Robinson in making this request. But this is not all. John K. Patterson, of the firm of Patterson & Co., testified that White had said to him that when the previous insurance expired he would try to get the insurance for their companies. He handed to him a bill from C. N. G. Butt & Co. for the premium on the renewal insurance for $60,000, and they then found that they were "up against it," that is, that the insurance for the renewal period had been written by C. N. G. Butt & Co. and they were likely to lose the business. He also testified: "I suggested to Mr. White that he return the Butt & Co. bill to them and state that we had written the insurance from Concord. I also suggested to him that he take the matter up with Mr. Rankin at Lowell, N. C., and see if we could not deliver our policies. In a few days Mr. Rankin came over to Concord and had a talk with Mr. White in regard to the matter, in our office, in my presence. Mr. Rankin told Mr. White, in my presence, that he would like very much for us to have the insurance, all things being equal, but he was under obligations to Butt & Co., on account of a reduction in rate that he had gotten. That, all things being equal, he would like to let us have it, but under the circumstances he was under obligations to Butt & Co., and he would like to leave the business with them, unless we could give a better rate. By

which I understood he meant that he would keep the Butt policies, and later on, if we could get a better rate, he would let us write it." There is no disagreement as to the authority of John C. Rankin in the premises, and being thus invested with plenary and overruling authority, what he said to White was a refusal to accept the Concord policies unless the rate of insurance was reduced, and an assertion that he would retain the Charlotte policies until it was. E. F. White testified that after the receipt of Rankin's letter of 23 December, 1910, that he turned to Patterson and said: "There is nothing to do but to cancel the (Concord) policies; that there is a letter from Mr. Rankin he could read, which explained itself; that it looked like we had lost out." Patterson testified that when he had reached the conclusion that he had lost the insurance, he would simply have "marked the policies 'Not Taken,' and returned them to the companies." The testimony discloses, without conflict, that White never expected to get the insurance without the (96) assent of Rankin or Robinson. He rejected a proposition of Patterson, when the crisis had arrived, to divide commissions with Butt & Co., and insisted, rather, that they should try for all the insurance exclusively, and expressed the belief that they would obtain it "in the long run." "I was thinking about getting insurance later on through Mr. Buxton," that is, through a different channel. "The more we recite the evidence, the more clearly does it appear that the Concord policies were merely left with White by Patterson & Co., to be delivered when accepted by Rankin, or by the plaintiff through Rankin, who was authorized to act for it. Either Robinson or White could negotiate for the insurance, but subject only to the ratification of Rankin, as the acknowledged head of the company.

It can make no difference in the result, what was intended by either party, nor can the contract be changed or modified by what one of the parties may now say he intended. It all depends upon what was said and done at the time. If no contract was made then, it cannot be made now *post facto*. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." *Prince v. McRae*, 84 N. C., 674, citing *Brunhild v. Freeman*, 77 N. C., 128, and *Pendleton v. Jones*, 82 N. C., 249. See also, *Bailey v. Rutjes*, 86 N. C., 517; *Lumber Co. v. Lumber Co.*, 137 N. C., 431; *Knitting Mills v. Guaranty Co.*, 137 N. C., 565. In *Lumber Co. v. Lumber Co., supra*, we said: "When the terms of an agreement are ascertained, its effect is determined by the law, and does not depend upon the uncertain or undisclosed notion or belief of either party." But even if the present expression of a former intention could be considered,

it could not change the result, as it is evident the parties, by their letters, meant that the transaction should "stand" as it then was, or that everything should remain *in statu quo*—that is, the Charlotte policies should be in force and the others should "stand" upon the proposal of White & Rankin to accept them in the place of the Charlotte policies, the condition of the substitution being that the rate should be reduced.

(97) Even in this aspect of the case, the Concord policies could not be effectually delivered until the condition precedent was performed. *Faunce v. Assurance Co.*, 101 Mass., 279; *Harnickell v. Insurance Co.*, 111 N. Y., 390 (2 L. R. A., O. S., 150); *Insurance Co. v. Wilson*, 187 U. S., 467. There are other facts that might well be considered with reference to this question of delivery. It appears conclusively that the premiums for the insurance under the Concord policies had not been agreed upon, as Rankin and Robinson had from the beginning insisted upon a lower rate than the one offered, and they never did agree to the higher rate. Their minds, therefore, had not met and agreed upon the same thing, as one of the essential elements, viz., the consideration, had not been fixed. So that, in this view, no contract was made. Patterson & Co., through White, had proffered the insurance on certain terms, which Rankin was unwilling to accept. He then received and kept the Charlotte policies, and the matter being in this shape, Rankin suggested, in his letter of 23 December, 1910, that it be kept in abeyance as it was, and without any change, until they could hear from the insurers represented by Patterson & Co. as to the lower rate. Rankin had rejected White's offer of the Concord policies, for Patterson testified: "Yes, it was my intention, when I delivered them to Mr. White, to make delivery to the plaintiff company, but we could not do it as Mr. Rankin was in the office there, and we tried to deliver them to him and he would not take them." Rankin had the power to overrule White, who was acting in two inconsistent capacities, one of which involved his personal interests, which conflicted with those of the plaintiff. Rankin, then, not only had the authority to act and to reject the policies, but it was eminently proper for him to exercise it, as he did, under the circumstances, his sole purpose being to do what was best for his principal, without any personal advantage to shake the wavering balance.

But there is another view of the case equally as fatal to the contention that the Concord policies were in force at the time of the fire. These policies, if ever delivered and in force, were of the standard form, that is, the form prescribed by the statute, Revisal, sec. 4760. The following is one of the provisions of each policy: "This policy shall be canceled, at any time, at the request of the insured, or by the company by giving five days notice of such cancellation." The standard form of policy originated, we believe, in the State of New York, and our form

was substantially copied from the one in use there. The Court (98) of appeals of that State has construed the provision of the policy in regard to cancellation, which we have quoted, in the case of *C. P. Iron Co., v. Insurance Co.,* 127 N. Y., 608, and it was there decided that all that is required for a cancellation of a policy and the immediate termination of the insurance is a request from the insured to the insurer, which, if transmitted by the mail, must have been received by the insurer, but as soon as received the cancellation takes effect at once. The policy then under consideration used the words, "may be canceled," instead of the words, "shall be canceled," which are those to be found in the policies sued on in this case. The Court, however, said that the terminology was practically the same and that the words "may be canceled," being the language of the insurer in its policy (which was not of standard form), was empoyed for the benefit of the insured, and should, therefore, receive a liberal construction from the Court, and that, as thus used, it is not merely permissive, but imperative, and has the meaning of "must" or "shall." It, therefore, held that the assent of the insurer to the cancellation was not required, as the parties could, by consent, have canceled the policy without any such provision. It was also said that while it takes two to make a contract, one may end it, if the contract itself so provides. This is a self-evident proposition. The Court, in that case, concludes with these words: "No consent of the insurer is essential. No meeting of minds is required. No act on his part is necessary. The contract through the force of its own provisions is ended by the action of the insurer or insured only. (*Stone v. Franklin Fire Insurance Co.,* 105 N. Y., 543.) Although the language of the parties is at the 'request' of the assured in the one instance and on 'notice' to the assured in the other, we think that in both it is within the power of the party desiring to end the contract to do so without either consent or action on the part of the other. When the insured surrenders the policy and requests that it be canceled, he can do no more. Unless that ends the contract, he is powerless to end it, and the company, while able itself to hang on or let go, as it wishes, can hold him against his will. An insolvent insurer, by refusing to cancel, (99) could prevent the insured from procuring other insurance." In our case, the general agents, who wrote the policies, retained them in their possession and kept them under their control, in the desk of Patterson & Co., or a desk in their office, and therefore no surrender of the policies was possible or necessary. *Hillock v. Insurance Co.,* 54 Mich., 531; 16 A. and E. (2 Ed.), 872. S. M. Robinson, in his letter of 15 December, 1910, not only requested the cancellation of the policies, but virtually directed or ordered that it should be done. The language of the letter is clear and explicit and its meaning unmistakable. It

also appears therefrom that Rankin concurred in making the request or order. And both Patterson and White understood what the letter meant, that is, a peremptory order to cancel, for White said, "We have lost out," that is, Butt & Co. have secured the insurance exclusively, and "there is nothing else to do but to cancel those Roberta policies. We both ought to be kicked for not notifying Butt & Co. not to renew their policies." We see, therefore, that under the statute and by the terms of the policy, the sole requirement to effect cancellation is a request by the insured duly communicated to the insurer, and no action on the part of the latter and no formal or physical defacement of the policy is required. A request thus made operates to cancel the policy, even if the insurer absolutely refuses to permit it to be done. 16 Am. and Eng. Enc. (2 Ed.), 877. The Concord policies were, therefore, canceled when the Robinson letter was received by White, and if not then when White received the letter of Butt & Co., dated 22 December, 1910. We do not think that Rankin's letter of 23 December, 1910, alters the situation. He manifestly did not intend to revoke what he and Robinson had already done. He was personally partial to White on account of their close business relation, but he felt under an obligation to Butt & Co. because of former favors, which had been denied by the Concord companies. There was a conflict between the two thus raised, and Rankin decided it in favor of Butt & Co., and justly so. We attach no special importance to the *prima facie* case made by the introduction of the Concord policies in evidence by the plaintiff. The facts are all before us and the bare presumption, as thus raised by the law, vanishes when confronted by the real facts of the case. *Spruill v. Insurance Co.*, 120 N. C., 141;

(100) *Powell v. Insurance Co.*, 153 N. C., 124; *Agen v. Insurance Co.*, 105 Wis., 217; *Coffin v. Insurance Co.*, 127 Fed., 555; *Andrus v. Casualty Co.*, 98 N. W., 200.

Our conclusion, therefore, is that the judge was right in setting aside the issues as to the Concord companies and giving judgment for the full amount of the loss against the Charlotte companies. This affirms the judgment of the court in both appeals.

Plaintiff's appeal: Affirmed.

Charlotte companies' appeal: Affirmed.

R. B. CARAVAN v. THE BOARD OF DRAINAGE COMMISSIONERS OF MATTAMUSKEET DRAINAGE DISTRICT.

(Filed 14 December, 1912.)

1. Drainage Districts—Bonds—Landowners' Liability—Interpretation of Statutes—Notice.

The bonds issued for the Mattamuskeet Drainage District referring to the acts under which they were issued and to the deed of Board of Education to the Southern Land Reclamation Company, and the deed securing these bonds referring to these acts and to the special proceedings under which they were formed, affect the bondholders with notice of the statute and deed in question; and it appearing on the face of the bonds that they are payable three-fourths of the principal and interest out of the assessments levied on the lands of the reclamation company described in its deed, and one-fourth thereof out of the assessments upon all the other lands "in the manner provided by law," it is *Held*, this amounts to a contract stipulation, affecting and binding upon the holder of each bond, that the obligation shall not constitute a general and pecuniary indebtedness of the district, but payable only out of the assessments as provided for by the law, and that the individual owners of the land who were originally such, and the transferees holding their title, shall never in any event be assessed for more than one-fourth of such liability.

2. Same—Statutes—General Clauses.

A subsequent clause appearing on the face of bonds issued by the Mattamuskeet Drainage District, that "for the prompt payment of this bond, etc., the full faith, credit, and revenues of the said district are hereby irrevocably pledged," is construed by the general terms used, as subordinate to and controlled by the specific stipulation in the preceding clause, confining liability of the individual owner to "one-fourth of the obligation as to each bond."

APPEAL from order of *Lane, J.*, heard at chambers, 19 Septem- (101) ber, 1912, from HYDE.

Civil action to enjoin the issuance of certain drainage bonds by the Mattamuskeet Drainage District, heard on return to preliminary restraining order before his Honor, *Henry P. Lane,* judge holding the courts of the First Judicial District, at chambers in Elizabeth City on 19 September, 1912. There was judgment dissolving the restraining order, and plaintiffs excepted and appealed, assigning for error that in the proposed bond issue the individual owners of land within the district were not sufficiently protected in the matter of restricting their obligations in any event to one-fourth of the amount of the bonds, as required by law and the proceedings and deeds under which the bond issue was to be made.

I. M. Meekins and M. H. Tillett for plaintiff.

Mann & Jones for defendant.

HOKE, J. The validity of this proposed bond issue has been expressly declared in *Carter v. Commissioners,* 156 N. C., 183, and many of the facts revelant to such issue will be found stated by that well-considered case. The present suit is brought by some of the individual owners of land within the drainage district, the plaintiff contending, as we understand his position, that the rights of these owners are not sufficiently protected and their liability properly restricted to one-fourth of the obligation represented by this bonded indebtedness, as provided by the law and proceedings applicable to the subject. After giving the matter most careful consideration, we are of the opinion that this apprehension is not well founded. The form of the proposed bond, made an exhibit in the record, expressly refers to the statutes under which they were issued, to wit, chapter 442, Laws of 1909, and chapter 509, Laws (102) of 1909, and all acts amendatory thereof, and also to the deed by which the board of education, holding the interest of the State in the lands affected, have passed such interest to the Southern Land Reclamation Company, the corporate owner of a large portion of the lands, supposed to be at least three-fourths in value. These acts give clear indication that only one-fourth of the cost may be charged against the individual landowners, and the deed in question makes reference to these acts and to the special proceedings under which the drainage district was formed, and further provides in specific terms that the grantee, the Southern Land and Reclamation Company, its successors and assigns, is to pay three-fourths of the cost of construction and maintenance of the enterprise. This special proceeding is based on the proposition that the liability of the individual owners shall be not more than one-fourth of the costs, as shown from the following excerpt from the petition: "It is understood, and your petitioners join in this petition with this condition attached, that the cost of the proposed improvement to the landowners in said proposed district, other than the State Board of Education, shall not exceed $100,000 for preliminary work of completing the drainage of said lake and district."

These references would affect the bondholder with notice of the contents of the statutes and deeds in question. *Claybrook v. Commissioners,* 114 N. C., 453, and authorities cited; and in addition there appears upon the face of the bond the following: "The principal and interest of this bond are payable as follows and not otherwise, to wit: Three-fourths of the principal and interest hereof are payable out of assessments levied on the lands of the Southern Land Reclamation Company described in a deed to it from the State Board of Education of the State of North Carolina, dated 14 January, 1911, and one-fourth of the principal and interest of this bond payable out of assessments upon all the other lands in the said drainage district in the manner provided

by law." In the absence of any inhibitive or qualifying provision in the Constitution or statutes affecting the question, this amounts to a contract stipulation affecting and binding upon the holder of each and every bond, that the obligation thereby incurred shall (103) not constitute a general and pecuniary indebtedness of the district, but is payable only out of assessments as provided for by the law, and that the individual owners of the land who were originally such, and the transferees holding their title, shall never in any event be assessed for more than one-fourth of such liability. *Claybrook v. Commissioners, supra; Meyer v. City and County of San Francisco,* 150 Cal., 131; *Morrison v. Morey,* 146 Mo., 567; *Hogan v. Commissioners Court,* 160 Ala., 544, and notes to this case in 37 L. R. A., N. S., pp. 1072-1073; *Liebman v. San Francisco,* 24 Fed., 705; 21 A. and E. (2d Ed.), pp. 41-65.

There is nothing in *Charlotte v. Trust Co.,* 159 N. C., 388 (reported in 74 S. E., p. 1054), that in any way militates against this position. In that well-considered case there was not only nothing to restrict payment to the assessments imposed pursuant to law, but the bonds issued by a municipality having full power to create the indebtedness contained express stipulation that they should constitute a "general personal and direct obligation of the city," in addition to being a charge on the property of abutting owners. Our conclusion is in no way affected by reason of a subsequent clause appearing on the face of each bond as follows: "For the prompt payment of this bond and for the prompt and faithful performance of all covenants and conditions hereof the full faith, credit, and revenues of the said district are hereby irrevocably pledged." Such provision, expressed in these general terms, must be construed as subordinate to and controlled by the specific stipulation confining liablity of the individual owner to "one-fourth of the obligation as to each bond."

There is no error, and the judgment of the lower court is

Affirmed.

Cited: Shelton v. White, 163 N. C., 93.

W. C. COILE v. THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

(Filed 11 December, 1912.)

1. Insurance Orders—Assessments—Payments—Custom—Suspension.

A check sent in due time, properly addressed, on a bank where the maker had ample deposit to cover it, in payment of an assessment to an insurance order in pursuance of a notice sent out by it to its members, and in accordance with the recognized and unrevoked custom of the insurance order, does not work a legal suspension of the member by reason of the remittance having failed to reach its proper destination in the required time.

2. Same—United States Mail.

An insurance order which by an unrevoked and recognized custom has received remittances by mail for assessments due it by its members, is estopped from insisting upon the forfeiture, under the policy contract, of the rights of a member who, in conformity with this custom, had mailed a good check to cover the assessment in time for it to have reached its proper destination by due course of the mails.

3. Negligence—Transactions by Mail—Custom—Revocation.

The regularity of the mail, a public agency, is such that it is not negligence to rely upon it as a matter of transmission, especially when it has been so used in the course of dealings between the parties, and there has been no express revocation.

4. Same—Insurance Orders—Assessments—Subsequent Payment—Reinstatement—Waiver—Estoppel.

The plaintiff duly mailed his good check to cover an assessment made against him and its other members by an insurance order, which not reaching its destination in time, worked a forfeiture as suspension under the rules of the association. While the plaintiff had been declared suspended he received an accident covered by his policy, the subject of the action. Upon being notified of his suspension, and before the accident, he applied for reinstatement: *Held*, (1) the plaintiff, under the facts of this case, was not legally suspended; (2) his application for reinstatement was not such an acknowledgment of his being lawfully suspended as would estop him from recovery; (3) the subsequent collection of this assessment and other ones by the insurance order was a waiver by it of its right to suspend the plaintiff, if otherwise it could lawfully have done so.

APPEAL by defendant from *Long, J.*, at April Term, 1912, of (105) BUNCOMBE.

Civil action. The following issue was submitted to the jury: Is the Order of United Commercial Travelers of America, the defendant above named, indebted to W. C. Coile, the plaintiff, as alleged in the complaint; and if so, in what amount? Answer: Yes; $275; interest from 23 March, 1910.

From the judgment rendered, the defendant appealed.

Mark W. Brown for plaintiff.
Bourne, Parker & Morrison for defendant.

BROWN, J. The defendant is a benefit society with an insurance feature, of which the plaintiff was a member. On 26 February, 1910, the plaintiff was suspended because of nonpayment of Assessment No. 99 in the sum of $2. On 23 March, 1910, the plaintiff met with an accident, about which there seems to be no controversy, and he brings this suit to recover the sum to which he would be entitled under the terms of the accident policy.

The plaintiff notified the defendant of the accident by mail on 1 April, 1910. The defendant contends that at the time of the accident the plaintiff was suspended as a member of the order, and was not entitled to its benefits. This is the only point necessary to consider upon this appeal.

The evidence tends to prove that Assessment No. 99 was levied 25 January, 1910, payable on or before 24 February, 1910. Notice was mailed to the plaintiff at his address with remittance blank and an addressed envelope was sent with the notice.

A part of the notice was in the following words: "This notice is mailed from the Supreme office, but your remittance must be made to the secretary of your council, as per inclosed envelope."

The testimony tends to prove that the plaintiff mailed his check at Morristown, Tenn., for Assessment No. 99, on 22 or 23 February, 1910, in a properly addressed and stamped envelope and in ample (106) time to reach the secretary at Asheville before the date when the said Assessment was due. At the time the plaintiff had funds in the bank with which to pay the check. Testimony tends to prove that it was a matter of custom for members of the order to pay their dues with checks duly mailed, and that they were accepted by the secretary in payment. The check was not received by the secretary, and on 26 February, 1910, the plaintiff was suspended because of nonpayment of Assessment No. 99.

Plaintiff did not know the check had not been received until 16 March, 1910, when he saw Wiley, the chief officer of Asheville Council, to whom he gave a duplicate check for said Assessment No. 99, and at the same time told him that he had sent the original check from Morristown to the secretary.

Upon receipt of the duplicate check, Wiley said, "That makes you all right." The plaintiff was then in good health, and it was seven days before the accident. This assessment was paid by the plaintiff and re-

tained by the defendant. After that the plaintiff was regularly assessed as a member for Assessment No. 100.

Upon the evidence we think his Honor was correct in holding that the plaintiff was entitled to recover, as he had not been lawfully suspended as a member of the order. The defendant not only collected and retained the $2 for Assessment No. 99, for the nonpayment of which he was suspended, but also retained the $2 for Assessment No. 100. The defendant cannot keep the plaintiff's money and escape liability. *Matthews v. Insurance Co.,* 147 N. C., 339; *Morgan v. Insurance Co.,* 42 Wash., 10.

It is true, the plaintiff applied for reinstatement prior to the accident, and it is contended that this was an acknowledgment that he had been properly suspended. We do not think so. The plaintiff applied because he had been notified that he had been suspended, but he had a right also to rely upon the fact that his Assessment No. 99 had been paid and that the company had no right to suspend him.

Assuming that he had been properly suspended, the defendant waived the same by collecting Assessment No. 99 and the subsequent Assessment No. 100, thereby treating the plaintiff in all respects as if he were a member in good standing. *Morgan v. Insurance Co., supra.*

A course of action on the part of the insurance company which
(107) leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. *Insurance Co. v. Eggleston,* 26 U. S., 577; *Insurance Co. v. Norton,* 96 U. S., 234.

In sending his check for Assessment 99, the plaintiff conformed to the custom recognized and adopted by the defendant. The regularity of the mail, a public agency, is such that it is not negligence to rely upon it as a method of transmission, especially when it has been so used in the course of dealings between the parties and there has been no express revocation. *Hollowell v. Insurance Co.,* 126 N. C., 398.

The judgment of the Superior Court is

Affirmed.

Cited: Mill Co. v. Webb, 164 N. C., 89; *Trust Co. v. Bank,* 166 N. C., 117.

(108)

C. F. SIPE ET AL. v. THOMAS HERMAN ET AL.

(Filed 4 December, 1912.)

1. Partition—Pleas—Sole Seizin—Ejectment—Parties.

When in adversary proceedings to partition lands resistance is made under the plea of sole seizin under a deed from the petitioners to the *locus in quo*, the proceedings, in legal effect, becomes an action of ejectment under the general issues thus raised, with the petitioners as plaintiffs and their adversaries as defendants.

2. Same—Parties—Burden of Proof—Possession—Bond.

When proceedings for partition of lands, by the plea of sole seizin, becomes in legal effect an action of ejectment, the burden of proof is on the plaintiffs to establish their title, and the defendants, in possession, are required to give bond.

3. Partition—Sole Seizin—Ejectment—Deeds and Conveyances—Title—Evidence—Judgments.

When in proceedings to partition lands the tenancy in common is not denied, except that the defendant claims sole seizin under a deed from the plaintiff to their interest in the lands, in the absence of evidence of the defendants tending to show a good and sufficient deed upon which they rely, judgment is properly rendered for the plaintiff.

4. Same—Married Women—Privy Examination.

Sole seizin being relied upon in an adversary proceeding to partition lands, under a deed alleged to have been made by the *feme* plaintiff, a tenant in common, with her husband, but without her privy examination, it is *Held*, that the deed of the *feme* plaintiff is void, and as no title passed thereunder, the defendants failed to show a superior title, and the defense must fall.

5. Deeds and Conveyances—Privy Examination—Title—Parol Evidence.

When a deed from a married woman, made without her privy examination, is relied on by defendant in his chain of title, it is incompetent on her cross-examination as a witness to contradict her testimony as to the quantity of the estate she thereby attempted to convey; and as the deed itself was insufficient, it was incompetent to prove by the witness, by parol evidence, that she and her husband had thereby conveyed the fee.

6. Husband and Wife—Actions—Joinder of Husband—Interpretation of Statutes.

While a wife may sue in her own right to recover her lands, her husband may join therein to assist her in the vindication of her right (Revisal, sec. 408).

7. Same—Registration.

In an action by the husband and wife to recover the lands of the latter, in which defendants claim sole seizin under a deed from them both,

but without the wife's privy examination, the recorded deed is not evidence, as it is void as to the wife, and no judgment could be rendered to dispossess her, or to the prejudice of her possession as against the husband, especially when the husband is suing in the right of the wife.

8. Estates—Husband and Wife—Tenant by the Curtesy Initiate—Constitutional Law.

The estate of the husband as tenant by the curtesy initiate is abolished by Article X, sec. 6, of the Constitution, leaving the wife's land, a part of her separate estate, her sole and exclusive property. The incidental right of the husband in his wife's land discussed by WALKER, J.

APPEAL by defendant from *Adams, J.*, at May Term, 1912, of CATAWBA.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

(109) *W. C. Feimster for plaintiff.*
S. H. Jordan and W. A. Self for defendant.

WALKER, J. This is a proceeding for the partition of the tract of land described in the petition, especially a tract of 10½ acres, among the owners, as tenants in common thereof, they having inherited the land from their ancestor, Mahala Herman, who originally was the owner thereof. Defendants Thomas and Elizabeth Herman deny the tenancy in common of plaintiffs with them and their right to partition, plead sole seizin, and specially aver that the plaintiffs, who are Cain F. Sipe and Fannie C. Sipe, conveyed their interest, or such as they once had, to Elkanah L. Herman, who devised it by his will to defendant Elizabeth Herman, for life, with remainder to another defendant, Thomas Herman, in fee. There is no dispute as to the tenancy in common between the parties and the resultant right to partition, unless the defendants have offered testimony sufficient in law to show that plaintiffs had parted with their title to Thomas and Elizabeth Herman, as above set forth. Under the old system, this would have been an action at law, there being no equitable element involved. There is no allegation or prayer for relief in the way of correction or reformation of the deed, upon which the defendants rely to support their plea of sole seizin. When the defendants denied, in their answer to the petition, that plaintiffs, claiming in the right of the *feme* plaintiff, Fannie C. Sipe, are tenants in common with them and plead *non tenent in simul* or sole seizin in themselves, the general issue in a proceeding for partition, the case in legal effect is converted into an action of ejectment, with the petitioners as plaintiffs, and their adversaries as defendants, the burden being on the plaintiffs, and the defendants being required to

give bond on filing their answer, which seems not to have been done in this case. *Huneycutt v. Brooks,* 116 N. C., 788; *Vaughan v. Vincent,* 88 N. C., 116; *Parker v. Taylor,* 133 N. C., 103; *Purvis v. Wilson,* 50 N. C., 22; *Alexander v. Gibbon,* 118 N. C., 796; *Bullock v. Bullock,* 131 N. C., 29. Plaintiffs proved that they and their contenants, Thomas being one, inherited the lands from their mother, Mahala Herman, and it appears that defendants Thomas and Elizabeth Herman, appellants, claimed under the will of Elkanah L. Herman, to whom (110) the said defendants alleged the land had been conveyed by the plaintiffs, so that those two defendants claimed under the plaintiffs; and having shown no superior title and none acquired by themselves, the plaintiffs have made out a *prima facie* case, which entitles them to judgment (*Cox v. Ward,* 107 N. C., 507), unless the position of defendant as to the alleged deed of plaintiffs to Elkanah Herman can be sustained, and we do not think it is tenable. There is certainly no valid deed from plaintiffs which passed the title to Elkanah Herman, as the land belonged to the *feme* plaintiff, a married woman, and the deed introduced by the defendants, purporting to be a deed signed by plaintiffs, contains no privy examination of the plaintiff Fannie C. Herman, and is, therefore, void as to her. *Cook v. Pittman,* 144 N. C., 530. Upon the cross-examination of Fannie C. Herman, defendant's counsel proposed to read the deed, as registered, to the witness, and the evidence was excluded. The deed was offered, as appears in the case, for the purpose of contradicting the witness, who on the same cross-examination had stated that she had only given to her father, Elkanah Herman, "a paper for a life estate," whereas the deed showed that a fee was intended to be conveyed. But defendants could not thus establish their title to the land by parol. *Cox v. Ward,* 107 N. C., 507. Defendants could only show a paper title by a deed or other instrument sufficient to pass title, and could not prove orally, even by the *feme* plaintiff as a witness, that they had acquired the fee from her and her husband. This is too plain for argument. The evidence was, therefore, immaterial and was properly ruled out. The defendant next offered to read in evidence the registry of the same deed. The court excluded the evidence upon objection by plaintiffs. The deed was not evidence as to the *feme* plaintiff (*Cook v. Pittman, supra*), the admitted owner of the land at the time it purported to have been executed, and her husband is only a formal party to the suit, claiming no interest therein, they having had no children, so far as appears. Defendants did not propose to prove the execution of the deed at common law for the purpose of showing color and then proving adverse possession. If in this way defendant (111) could have shown a good title as against her husband, a merely

nominal party, it would not have barred her right of entry, and would, therefore, have been of no practical advantage to them. They could get no judgment for the posession against her, or writ of possession to oust her, as she being the owner and having the present right of possession, the court would not give a judgment and a writ to the prejudice of her right. *Springs v. Schenck*, 99 N. C., 552. Besides, as we have indicated, her husband is suing, not for himself, but in her right, and is merely joined with her permissibly, under Revisal, sec. 408. This being her separate property, she could sue alone for its recovery, but is permitted to join her husband to assist her in the vindication of her right. It has been held that Constitution, Art. X, sec. 6 abolished the estate of the husband as tenant by the curtesy initiate, the land being her sole and exclusive property, if a part of her separate estate. *Walker v. Long*, 109 N. C., 510; *Thompson v. Wiggins, ibid.*, 508; *Perkins v. Brinkley*, 133 N. C., 154; *Hodgin v. R. R.*, 143 N. C., 93. It is said in *Thompson v. Wiggins, supra*, and *Hodgin v. R. R., supra*, that he has a sufficient interest in the wife's land to constitute him technically a freeholder, and this interest is defined to be a right of joint occupancy with his wife, and he has the incidental right of ingress and egress. *Thompson v. Wiggins, supra*, citing *Manning v. Manning*, 79 N. C., 293. Speaking for myself, and not committing the Court to my view, it does not seem to me that this is a freehold estate, nor an estate at all, but a mere right of joint occupancy with the wife, which appears to be based upon their social relations or conjugal duties. *Perkins v. Brinkley, supra.* But *Justice Bynum* said, in *Manning v. Manning, supra:* "The plaintiff is entitled to be let into the possession of her lands, and, in a legal sense, the sole and exclusive possession." Referring to Constitution Art. X, sec. 6, *Justice Connor* said, in *Perkins v. Brinkley, supra*, quoting the language of *Merrimon, J. C.*, in *Walker v. Long, supra:* " 'This provision is very broad, comprehensive and thorough in its terms, meaning, and purpose,

(112) and plainly secures to the wife the complete ownership and contral of her property as if she were unmarried, except in the single respect of conveying it. She must convey the same with the consent of her husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate. The strong, exclusive language of the clause recited above is that the property "shall be and remain the sole and separate estate and property of such female," the wife.' All of our legislation and judicial construction of the Constitution and statutes have been in the same direction."

The Court has said the husband's right is a freehold estate, and we will continue, therefore, so to treat it; but it is an anomalous one, and

personal to the husband, and surely does not give a stranger the right to oust the husband against the consent of the wife, as the husband's right is based upon their conjugal relation. It may be added that the husband has claimed no interest, or rather no estate, in the land, and simply joined with his wife in the deed to Elkanah Herman, according to the requirement of the statute, in order to pass her estate.

Under proper instructions from the court, the jury returned a verdict for the plaintiffs, and judgment was entered upon it. We find no error in its doing so.

No error.

Cited: Ditmore v. Rexford, 165 N. C., 620.

(113)

HENRIETTA MILLS v. RAY McDANIEL ET AL.

(Filed 4 December, 1912.)

1. Clerks of Court—Probate—Appeal—Superior Court—Jurisdiction.

Clerks of the court exercising probate powers are not regarded under our Constitution and statutes as tribunals or officers exercising a separate and independent jurisdiction to that of the Superior Courts, and their judgments and rulings on appeal are very generally subject to the supervision and control of the courts.

2. Same—Issues of Fact and Law—Procedure.

The rulings or decisions of the clerks of the court must be "transferred for trial to the next succeeding term of the Superior Court (Revisal, secs. 78, 114, 529, 717), if determinable issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented.

3. Same.

Upon appeal to the Superior Court from the rulings or decisions of the clerks of the court in matters of probate, very large latitude is allowed in the method of procedure and the extent of the relief which may be afforded by the appellate court, with a view of promoting right decisions.

4. Same—Evidence.

An appeal may be taken from the adverse ruling or decision of the clerk of the court in proceedings to establish and declare a proper probate and privy examination to a deed by a *feme covert*, upon the ground

that it had been duly taken, but the printed and written form had become detached from the deed in some way and lost or destroyed; and in this case it is *Held* sufficient evidence for the judge to reverse the ruling or decision of the clerk and to sustain the probate, the evidence consisting of entries and *indicia* on the face of the deed, and testimony of the clerk himself, together with that of another witness.

APPEAL by defendant from *Foushee, J.*, at Spring Term, 1912, of RUTHERFORD.

Proceeding to establish and declare the proper probate of a deed, including the privy examination of a *feme covert*, heard on appeal from the clerk of the Superior Court before *Foushee, J.*, at Spring Term of RUTHERFORD, 1912.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

E. J. Justice, J. W. Pless, and York Coleman for plaintiff.

R. S. Eaves and McBrayer, McBrayer & McRorie for defendant.

HOKE, J. The plaintiff, claiming the land under a deed and mesne conveyances from William Butler and his wife, Myra, instituted
(114) a proceeding before the clerk of the Superior Court of Rutherford County to establish and declare a proper probate of said deed, and alleged that this probate and privy examination had been duly taken, but the printed and written form showing this had become detached from the deed in some way and lost or destroyed.

On the original hearing before the clerk there was finding and adjudication by that officer that no proper probate had ever been had, and on appeal this finding and adjudication was affirmed by the Superior Court and again affirmed in this Court (see case, 155 N. C., 249). Pending a petition to rehear and on application formally made, another hearing was allowed on account of newly discovered evidence. And this order having been properly certified, the clerk again heard the matter and gave judgment substantially the same as that first rendered by him. On appeal, this judgment was reversed in the Superior Court, and the cause is now before us on defendant's appeal.

It was chiefly urged for error by the defendant, stating the position in his own language, "That the judge of the Superior Court had no jurisdiction or power to review the finding of the clerk on the question involved, that is, that no appeal lies from such finding; the purpose of the motion or proceedings being to set up or amend the record of the probate court of Rutherford County, of which the clerk is *ex officio* judge," citing the case of *Perry v. Adams*, 83 N. C., 266, and some others of like purport. If it be conceded that this is a proceeding to amend or restore a lost record, defendant's position could not be sustained. Our Constitu-

tion and statutes do not now provide or recognize a probate court or probate judge as a tribunal or officer exercising a separate and independent jurisdiction. Under the law as it now exists with us, these matters of probate are chiefly referred to the clerks of the Superior Court and the judgments and rulings of these officers are on appeal very generally subject to the supervision and control of the court, either in chambers or in term. If determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are ordinarily presented, such issues must be "transferred for trial to the next succeeding term of the Superior Court" (Revisal, secs. 78, 114, 529, and 717), and if there be issues of law or material questions of fact decided, these (115) may be reviewed by the judge at term or in chambers on appeal properly taken, and in passing upon these questions of fact the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid to the proper disposition of the questions presented. With the view of promoting right decisions very large latitude is allowed in the method of procedure and the extent of the relief which may be afforded by the appellate court, a position supported by authoritative decisions and which is in accord with the policy and express provisions of our statutes on the subject. *In re Battle,* 158 N. C., 389: *Williams v. Dunn,* 158 N. C., 399; *Tayloe v. Carrow,* 156 N. C., 6; *Beckwith et al., ex parte,* 124 N. C., 111; *Wynne v. Small,* 102 N. C., 133; *James v. Spencer,* 95 N. C., 271; Revisal 1905, secs. 610, 611, 612, 613, 614.

The case of *Perry v. Adams, supra,* and other cases of like kind, relied upon by defendants, were appeals to the Supreme Court on questions involving the exercise of discretionary powers of the lower court, and were made to depend chiefly on the constitutional provision restricting the appellate powers of this Court to "matters of law or legal inference," and have no application to appeals from orders and judgments of the clerk to the judge in chambers or the Superior Court in term. *Bagley v. Wood,* 34 N. C., 90.

It was further contended, "That the evidence is insufficient to support the finding that the privy examination of Myra Butler was properly taken," but if such a position were open to defendants, the facts in evidence are entirely against them. The entries and *indicia* on the face of the deed, the direct evidence of the clerk who acted in the premises, and the additional and supporting testimony of the witness Wooten, afford convincing evidence of the privy examination of the *feme covert,* and fully justify the action of his Honor in finding that the deed was correctly and properly proven as to both the grantors.

We find no error in the record, and the judgment must be

Affirmed.

(116)

LAURA SPENCER v. JOHN H. FISHER.

(Filed 20 December, 1913.)

1. Intoxicating Liquors—"Civil Damage Laws"—Sale to Minors—Interpretation of Statutes.

Revisal, sec. 3525, giving a right of action for exemplary damages to the father, etc., against one who by sale or gift violates the provisions of section 3524, should be construed in connection with the latter section, thus making section 2535 apply to any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit, and providing that such persons "shall be considered dealers within the meaning of this section," 3524.

2. Same—Penal Statutes—Strict Construction—Common Law.

Revisal, secs. 3524 and 3525, being among that class of statutes known as "civil damage laws," are highly penal, and give a right of action unknown to the common law, and should be strictly construed; and no one may be held liable under the statutes unless included in their terms.

3. Intoxicating Liquors—"Civil Damage Laws"—Sale to Minors—Dealers—Interpretation of Statutes.

When a shipment of intoxicating liquor is made to a minor under circumstances that would otherwise give a right of action to the parent, etc., under the provisions of section 3525 of the Revisal construed in connection with section 3524 thereof, and a bill of lading attached to the draft for the liquor is sent through the bank, which is paid by the minor to the cashier of the bank, who gives him the bill of lading with which he gets the liquor, the cashier, in his capacity as such, is not such a person as the statute contemplates, and an action against him, under its provisions, will not lie.

CLARK, C. J., concurring.

APPEAL by plaintiff from *Whedbee, J.*, at the May Term, 1912, of CRAVEN.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

W. D. McIver for plaintiff.
No counsel for defendant.

(117) WALKER, J. This action was brought by the plaintiff to recover damages of the defendant for unlawfully selling liquor to her son, Carl Spencer, in violation of Revisal, sec. 3525. The court sustained a demurrer to the complaint, and plaintiff appealed.

In order to understand the nature of the cause of action given by that statute, we will have to read and consider it in connection with the next preceding section.

Section 3524: "If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of 21 years, knowing the said person to be under the age of 21 years, he shall be guilty of a misdemeanor; and such sale or giving away shall be *prima facie* evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section."

Section 3525: "The father, or, if he be dead, the mother, guardian, or employer of any minor to whom a sale or gift shall be made in violation of the preceding section, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such illegal sale or gift shall recover from such party or parties so offending such exemplary damages as a jury may assess: *Provided,* that such assessment shall not be less than $25."

There was no action at common law of this kind. It is entirely statutory, and hence must be governed wholly by the provisions of the statute. Black on Intoxicating Liquors (1892), sec. 281. The statutes which are now familiarly known as "civil damage laws" are intended to impose a civil responsibility upon liquor dealers for some of the evils which their traffic engenders. These laws give a right of action, against such persons, to innocent parties who sustain injury by the intoxication of persons supplied with liquor by the defendants, or by the consequences of such intoxication, or by the acts of intoxicated persons, or by the furnishing of liquor to minors or drunkards, with knowledge of the minority or intemperate habits, after warning given not to do so. The civil damage law should receive a strict construction, being highly penal in its character and introducing remedies unknown to the common law, (118) and the statutes being framed in some jurisdictions so as to give to the party prosecuting a decided advantage over the party defending. Hence, for example, no person can maintain an action under its provisions to whom a right of action is not given by its terms. But, on the other hand, while a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise and which were caused by the parties who furnished such means. It would be a gross failure of justice to put so narrow a construction upon these acts as to impair the effects they were intended

to produce. Their beneficent purpose is not to be defeated by technical or verbal niceties. Under the civil damage laws of the more usual type, any person may maintain an action for injuries of a certain character suffered by or inflicted upon him through the intoxication of a third person, or by the acts of such person while drunk, when the intoxication was caused, entirely or in part, by liquor furnished by the defendant. But as the action is statutory, all the statutory requisites must be present before the suit can be sustained. Thus, there must be a "sale," "gift," or "furnishing" of liquor, according to the terms of the act. Black Int. Liquors, secs. 277, 279, and 304, and 23 Cyc., p. 309 *et seq.* The effect of statutes of this kind is to create a new cause of action in tort, and it is purely an action *ex delicto,* and not only that, but it is for a personal tort and injury, as much so as in the case of an assault and battery. Black, sec. 281. It is said in 23 Cyc., p. 309, that, "Civil damage laws create a new right of action unknown to the common law. A proceeding thereunder is not a criminal prosecution or an action for the recovery of a fine or penalty; it is simply an action of tort founded on the statute. And where the common-law system of pleading is in force, 'case' is the proper form of action under such statute."

(119) If these well settled principles be applied to the facts stated in the complaint, and our statute is considered in connection therewith, it will be seen most clearly that the judgment of the court was correct. The sale of liquor to Carl Spencer is alleged to have been under these circumstances: A. Hatke & Co.'s agent at New Bern, N. C., took his order for a case of whiskey, which was shipped by rail to New Bern, and a draft, with bill of lading attached, for the price of the liquor was sent by mail to the defendant, the Mutual Aid Banking Company, for collection. The defendant's cashier, John H. Fisher, was informed by Carl Spencer's uncle that Carl was a minor and unmarried; but nevertheless, when Carl Spencer paid the draft, he surrendered to him the bill of lading, which was presented by Carl Spencer to the freight agent of the Norfolk Southern Railway Company at New Bern, and the package of liquor was thereupon delivered to him.

It will be observed that Revisal, sec. 3525, gives the action to the mother and others named, when the sale to the minor is made in violation of the preceding section, that is, section 3424, which by its very terms confines the forbidden sales to those made by "dealers in intoxicating drinks and liquors." The defendants are not such dealers, and no one, we presume, would say otherwise, for the statute itself, section 3524, defines such a dealer to be "a person who keeps on hand intoxicating drinks or liquor for the purpose of sale or profit." There is no allegation in the complaint that defendants ever dealt in liquor so as to

make them "dealers" within the meaning or words of that definition, and they certainly are not within the intent or spirit of the statute. We have seen that as this is a right and remedy in derogation of the common law, or which did not exist before the passage of the law, the plaintiff must show such a case as will come within the language of the statute when strictly construed, but even the most liberal interpretation of its words will not embrace the case as made by the allegations of plaintiff's complaint.

The plaintiff cannot recover in any view of the case stated in her complaint, and whether the shipment was interstate or intrastate can make no difference, and we decline to consider that matter.

In what we have said we do not mean to imply that even at (120) common law a mother may not have an action for damages for the unlawful sale of liquor to her minor child, when the effect of so doing is injurious to him and, consequentially, to her, as if the child. by reason thereof, should contract the baneful habit of excessive drinking and intoxication, or shall be rendered unfit for any useful employment. We merely mention the matter, without expressing any opinion in regard to it. Some reference was made to it by *Justice Montgomery, arguendo,* in *Holloman v. Harward,* 119 N. C., 150. In that case a husband was permitted to recover damages of defendant for selling laudanum to his wife for use as a beverage, after being sufficiently cautioned not to do so, by which her mental and physical faculties were greatly impaired, to such an extent that she became an opium eater, and he was consequently deprived of her companionship, and otherwise seriously damaged. Suffice it to say that this action was brought upon the statute, and there are no allegations in the complaint sufficient to authorize a recovery for any other cause. We need not consider the defendant's other objections to plaintiff's complaint. The plaintiff has simply failed to allege any cause of action at common law, or under the statute, against the defendant, and the demurrer was, therefore, properly sustained.

Affirmed.

CLARK, C. J., concurring: The liquor was shipped from Richmond, Va., by A. Hatke & Co., wholesale whiskey dealers in that city, consigned to themselves at New Bern, N. C. On its arrival at New Bern the interstate dealing was completed. Any subsequent act to transfer the whiskey from Hatke & Co. to Carl Spencer, and the receipt of money from Spencer by Hatke's agent, was a transaction in this State forbidden by our statute. In *Delamater v. South Dakota,* 205 U. S., 93, it was held that, "Since the enactment of the Wilson law, which expressly provides that intoxicating liquors coming into a State should be as com-

pletely under the control of the State as though manufactured therein, the owner of intoxicating liquors in one State cannot, under the commerce clause of the Constitution, go himself or send his agent into an-
(121) other State and in defiance of its laws carry on the business of soliciting proposals for the purchase of such liquors." If it is a violation of State law for Hatke through an agent to solicit a buyer for his liquor, it follows that he could not after the arrival of the liquor here, through an agent, dispose of it to Spencer and receive payment therefor without being liable to an action under Revisal, 3525.

While the act is an intrastate act, our statute, Revisal, 3525, gives an action for damages only against the "dealer" in intoxicating liquors. It is not like a statute making such act a misdemeanor, for in that case those aiding and abetting are equally guilty. Our statute gives an action against the dealer only, and hence the demurrer was properly sustained. If, however, the plaintiff could obtain service upon Hatke by attachment of property or otherwise, the action would lie against him under our statutes.

WAYNE MERCANTILE COMPANY ET ALS. v. COMMISSIONERS OF MOUNT OLIVE.

(Filed 14 December, 1912.)

1. Cities and Towns—Taxation—Tax on Merchants—Graduated Tax.

An incorporated town, having the legislative authority to impose a license tax on trades, etc., may impose it upon merchants by a flat rate of taxation uniformly made; and while a graduation of the tax, if that method is pursued, is better regulated upon a basis of a percentage of sales, yet it is legal if made upon a system of dividing the merchants roughly into a certain number of classes according to the amount of their annual sales.

2. Same—Interpretation of Statutes.

Under the provisions of section 30, chapter 201, Private Laws of 1905 (repealed in 1907 but reënacted by chapter 28, Private Laws of 1911), and section 48 of said chapter (Private Laws 1905) the town of Mount Olive is empowered to levy a license tax on merchants, graduated in certain classes according to their annual sales.

APPEAL by plaintiffs from order of *Ferguson, J.*, at chambers,
(122) of WAYNE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

W. C. Munroe for plaintiffs.

M. T. Dickenson for defendants.

CLARK, C. J. This is an action submitted without controversy to determine the validity of the following ordinance of the town of Mount Olive, levying a graduated license tax according to the amount of sales of merchants doing business in the town of Mount Olive, as follows: "On every merchant, storekeeper, or dealer in goods, wares, or merchandise, a graduated tax as follows: On annual sales, of $50,000 or over, $75; $20,000 to $50,000, $50; $12,000 to $20,000, $25; $5,000 to $12,000, $15; $5,000 or less, $10."

The charter of the town of Mount Olive, Private Laws 1905, chap. 201, provides among other things, section 30, as follows: "That the commissioners of the town of Mount Olive, in addition to the powers of taxation already granted in the charter of said town and the amendments thereto, shall be and are hereby empowered to levy and collect annually a privilege or license tax on all trades, professions, agencies, business operations, exhibitions, and manufactories in said town of Mount Olive."

That section was repealed, it is true, in Private Laws 1907, but was reënacted in Private Laws 1911, chap. 28. Section 48 of the charter, Private Laws 1905, chap. 201, is as follows: "The town of Mount Olive is hereby vested with all the powers, rights, privileges, and immunities enumerated in chapter 62 of The Code not inconsistent with any provision of this act."

The plaintiffs concede, and it is established by undisputed authority, that a flat rate of taxation upon an occupation would be legal, but it is contended by the plaintiffs that if any graduation is made it must be made strictly by a percentage on the amount of sales. A flat rate is manifestly the most inequitable, though it is undoubtedly legal. Admitting that graduation by percentage is a juster method, the (123) town authorities are not compelled to adopt it when they decide to avoid the most inequitable.

The town of Mount Olive might have laid a flat tax upon all merchants, requiring all to pay the same amount; but instead of this, it selected, not the better method of a tax graduated according to the percentage of sales, nor the best method of a graduated tax requiring a higher rate per cent on large receipts than on smaller receipts, but the authorities chose the system of dividing the merchants roughly into five classes according to the amount of their annual sales. Cooley on Taxation (3 Ed.), 261, says: "Even within the class taxed, however, there may be rules of distinction, and these are perfectly admissible, provided they are general rules and are observed. If a State, for example, were to decide to levy an occupation tax upon one of the learned professions, it might decide to lay the same upon each

member, or it might discriminate so that the tax should be proportioned to the professional income. Either course would be admissible, provided the rules are made general, though the latter may be the more equitable. But questions of mere equity in taxation are for the Legislature, not for the courts." When the power of taxation is vested by the Legislature in the town authorities the same rules apply.

In this case there are five classes of merchants. Those coming within each of these five classes are treated alike as to taxation upon their occupation, which is all the law requires, and the basis of the division into classes is purely one of discretion in the taxing authority. This point has been too often decided by the State to be an open question.

In *Gatling v. Tarboro,* 78 N. C., 122, it is said: "The Constitution, while it requires all property to be taxed, expressly authorizes the tax on trades, etc., which must be a tax in addition to the tax on the property of the traders, which is common to all property-owners. It is also argued, and the point is much insisted on, that the tax was not uniform because it was not the same sum on every trader, but was graduated according to the sales of the preceding quarter. A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed, Burroughs on Taxa-
(124) tion, sec. 77. It may be different upon a dealer in whiskey by retail from that on a wholesale dealer; or on a dealer in whiskey from what it is on a dealer in grain, etc. So it does not cease to be uniform because it is $1 on all traders who sell to the amount of $1,000, they being in one class, and $4 on all who sell on the amount of $4,000 in the same time, who form a different class." This case has been repeatedly cited and affirmed.

In *S. v. Powell,* 100 N. C., 525, it is held: "A tax is uniform which is the same on all persons in the same class as on innkeepers, on railroads, etc.; but it is in the discretion of the taxing power to graduate the tax according to the extent of the business taxed or to impose a single tax on the occupation.

In *S. v. Stevenson,* 109 N. C., 733, it was held: "It was in the discretion of the Legislature to impose either a specific tax or one graduated by the extent of the business done. *S. v. Powell,* 100 N. C., 525. Such tax is uniform when it is equal upon all persons in the same class. *Gatlin v. Tarboro,* 78 N. C., 119; *S. v. Powell, supra.* Graduating a merchant's license tax by the amount of his purchases of a certain class of goods, and not by the amount of his total purchases, is not imposing unequal taxes on goods. It is merely a mode of graduating, according to the wisdom and discretion of the Legislature, the amount of the license tax for carrying on any specific occupation."

In *Rosenbaum v. New Bern,* 118 N. C., 87, the merchants were classified into five classes, *i. e.,* and taxes were laid: On merchants whose receipts were $10,000 and upwards per annum, $2 per month; on merchants whose receipts were from $5,000 to $10,000, $1.25 per month; on merchants whose receipts per annum were $1,000 to $5,000, $1 per month; on merchants whose receipts were less than $1,000, 50 cents per month. This tax was objected to on the ground that it was not uniform, but it was sustained.

In *Cobb v. Commissioners,* 122 N. C., 311, the ordinance in question exempted hotels whose gross receipts were under $1,000; levied a tax of $10 when the gross receipts were between $1,000 and $2,000, and on hotels whose gross receipts were over $2,000 a tax of one-half of 1 per cent. It was held that such classification was valid, the tax (125) being uniform on all subjects in the same class.

In *S. v. Carter,* 129 N. C., 561, the Court sustained, citing the above authorities, a license tax on the business of buying and selling fresh meat, graduated according to the population, *i. e.,* "In cities or towns of 12,000 inhabitants or over $7.50; in cities and towns of from 8,000 to 12,000 inhabitants, $5; in cities and towns under 8,000 inhabitants, $3."

In *Lacy v. Packing Co.,* 134 N. C., 572, the above authorities and others were cited, the Court thus summing up the law: "It is settled that a *license tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.*" It is pointed out that the constitutional provision requiring uniformity applies only to property, but as to license taxes it quotes with approval the following from *S. v. Stephenson,* 109 N. C., 734 (26 Am. St., 595): "It is within the legislative power to define the different classes and to fix a license tax required of each class. All he can demand is that he shall not be taxed at a different rate from others in the same occupation, as classified by legislative enactment. This is stated as a universal rule. 1 Cooley on Taxation (3 Ed.), 260." When the license tax is prescribed by the municipal authorities under authority conferred by the Legislature, the same rule applies. The above cases are cited and approved. *Dalton v. Brown,* 159 N. C., 182.

In *S. v. Williams,* 158 N. C., 613, *Walker, J.,* says: "In laying the tax the different subjects may be reasonably, though not arbitrarily, classified, and a different rule of taxation prescribed for each class, provided the rule is uniform in its application to the class for which it was made. *R. R. Tax Case,* 92 U. S., 574; *Worth v. R. R.,* 89 N. C., 291."

Connor and Cheshire on the Constitution, 271, say: "It is unquestionably in the discretion of the taxing power to graduate the tax ac-

cording to the extent of the business so taxed, or to impose a single tax upon an occupation without regard to its extent."

In *Winston v. Taylor,* 99 N. C., 210, under a provision of the (126) charter of Winston, in exactly the same language as section 30 in the charter of Mount Olive, it was held that an ordinance of the town imposing a graduated tax on dealers in leaf tobacco was valid. In *S. v. Worth,* 116 N. C., 1007, it was held that a charter conferring the power to levy a license tax on "trades" must be interpreted not only as embracing the occupation of mechanics or merchants, but all who are engaged in any employment or business for gain or profit.

It is true that the town authorities in this case in graduating the tax have resorted to an unusual graduation. That which commends itself to modern thought is a graduation by which a higher tax is laid pro rata on larger receipts than on smaller ones. For instance, in England the taxation upon incomes and inheritances ranges from 1 to 15 per cent, according to the increase in the size of the estate or income. In France such taxes range from 1 to 23½ per cent, according to the increase in the size of the estate or income, those receiving larger sums being deemed able to bear equitably the increased per cent in the rate of taxation with the increase in the size of the estate. The same is the rule in some of the States of this country and in other countries. While the defendant commissioners have reversed this rule, and to some extent have laid a somewhat larger tax proportionately on the smaller receipts, we are not prepared to say that this is not within the scope of the taxing authorities. It is a matter to be corrected by their constituents either by proper complaint or by electing new officers. It is not within the supervisory power of this Court. *Brodnax v. Groom,* 64 N. C., 250. The judgment affirming the validity of the ordinance is

Affirmed.

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(127)

J. E. OWENS AND WIFE v. R. H. WRIGHT AND H. A. FOUSHEE, TRUSTEE.

(Filed 20 December, 1912.)

1. Public Sales—Illegal Contracts—Suppression of Bidding.

An agreement to suppress bidding at a public sale is *contra bonos mores,* and the law will not assist either party to enforce such an agreement.

2. Same—Offer and Acceptance—Consideration.

As a result of an agreement between plaintiff and defendant made at a public sale, that the former should pay the latter the amount of his

bid and a certain sum of money on a note he owed him, the property was knocked down to the defendant. The plaintiff was unable to comply with his part of the agreement, whereupon the defendant made a proposition that if the plaintiff paid a certain less sum by noon of that day he should have the property, which the plaintiff accepted, and before the appointed time went to the defendant to pay the agreed sum, and found that the defendant had sold to a third party: *Held*, (1) the first agreement was unenforcible, not having been complied with, and as being *contra bonos mores;* (2) the subsequent offer and acceptance made a new and separate contract, not affected by the infirmity of the first, and is enforcible.

3. Usury—Equity.

A debtor seeking the aid of a court of equity will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforcible against the creditor being the excess of the legal rate.

4. Same—Interpretation of Statutes.

Our usury statute, Revisal, 3712a, does not affect the equitable principles relating to obligations concerning which the debtor invokes the equitable jurisdiction of the courts, as, in this case, injunctive relief against foreclosure of the security, and an inquiry into the status of the debt on account of the usurious charge of interest thereon.

5. Same—Mortgages.

A mortgage debtor sought the equitable relief by injunction against the foreclosure of a mortgage given to secure his note tainted by usury, and asked that the debt be inquired into on that account. The mortgaged property was sold, and after paying off prior encumbrances, a certain amount of money was available as a credit on the plaintiff's indebtedness, which payment was resisted by the plaintiff on the ground that, under our statute, Revisal, 3712a, the interest and penalty were forfeited, and the amount was therefore not due: *Held*, (1) the plaintiff having sought equitable relief, must do equity, and was chargeable with the principal of his debt and the legal rate of interest thereon; (2) the statute had no application in administering the equities between the parties.

WALKER and ALLEN, JJ., and CLARK, C. J., dissent, in part.

APPEAL by plaintiffs from *Whedbee, J.*, at July Special Term, (128) 1912, of DURHAM.

Civil action. The complaint sets out two causes of action: (1) To recover damages for breach of contract in regard to the sale of a stock of goods; (2) to restrain the sale of plaintiffs' real estate under the power of sale, contained in a deed in trust from plaintiffs to H. A. Foushee, trustee, securing a note for $4,000, bearing interest from maturity, due twelve months after date, dated 31 August, 1909, payable by J. Henry Smith Company, a corporation, and J. E. and Emma D. Owens to J. Henry Smith and indorsed to R. H. Wright 31 August,

1909. On the back of the note are indorsed certain payments. The ground upon which the injunction is asked is that the note is usurious, and plaintiffs seek to eliminate the alleged usury and set up as a counterclaim or set-off the penalty of double the interest.

At the conclusion of plaintiffs' evidence, defendants offered none, and moved for judgment of nonsuit. His Honor rendered the following judgment:

"This cause coming on to be heard, and being heard at this term of the court, before his Honor, *H. W. Whedbee,* judge, and a jury, at the conclusion of the evidence offered by the plaintiffs, the defendant R. H. Wright, through counsel, waived any right to personal judgment against the plaintiffs, or either of them, for any balance claimed on the note, and moved judgment of nonsuit under all the evidence of the plaintiffs and the admissions of record; and, further, that the amount admitted to be in the hands of R. P. Reade, trustee, be turned over to the defendant R. H. Wright, to be applied to the note referred to in the pleadings. The motion was allowed.

"Thereupon it is ordered and adjudged by the court that the (129) plaintiffs take nothing by this action, and pay to R. H. Wright the sum of $664.25, less taxes, to be paid by the said trustee, it being the amount admitted to remain in the hands of the trustee after paying off and discharging prior encumbrances. The costs of this action will be taxed by the clerk of the court against the plaintiffs."

It appears that pending this action the real estate belonging to plaintiffs was sold under a first mortgage (that of defendant Wright being a second mortgage), and that after satisfying the first mortgage there is $664.25 only applicable to the second mortgage.

From the judgment rendered, the plaintiffs appealed.

Guthrie & Guthrie, Manning & Everett for plaintiffs.
Fuller & Reade, Bryant & Brodgen for defendants.

BROWN, J. 1. In respect to the breach of contract in the sale of the goods, the facts are that the Smith Company's goods were being sold at auction by the receivers; there were other bidders at the sale; all had dropped out except plaintiff and defendant. Plaintiff Owens bid $1,465. Defendant bid $5 more. While this bid was being cried, defendant proposed to plaintiff that, if plaintiff would stop bidding and let defendant have the goods, defendant would sell them to plaintiff at the amount of defendant's bid, viz., $1,470, on condition that, in addition to said sum, plaintiff should pay defendant $800 on the note hereinbefore mentioned. Plaintiff accepted the proposition and stopped bidding, and the goods were "knocked down" to defendant.

As we understand the case, the plaintiff does not seek to enforce *this* contract, or to recover damages of defendant for its breach.

Plaintiff could not recover, if nothing else appeared, for two reasons: first, because he failed to comply with the contract himself, and, secondly, because the enforcement of such an agreement, by which bidding at public sales is suppressed, is *contra bonos mores,* and the law will not assist either party to enforce such an agreement. *Ingram v.* (130) *Ingram,* 49 N. C., 189; *Blythe v. Lovingood,* 24 N. C., 22.

The plaintiff further testifies that he endeavored to raise the $2,270 in time to pay the defendant the $1,470 for the goods and the $800 on the note, but failed to do so, and then informed the defendant that he could not comply with the agreement.

Whereupon defendant said to plaintiff on Saturday morning: "I will tell you what I will do: if you will raise $1,880 on this thing, I will try to hold the offer open until 12 o'clock; but you must hurry up."

Plaintiff further testifies that he accepted the offer and raised the $1,880 and went to defendant before 12 o'clock Saturday to comply with the new agreement; that at 11 or 11:30 a. m. plaintiff saw defendant, who at once said: "You are too late; I have held the thing open as long as I could, and can't hold it any longer, and think I have sold it." The defendant had sold the stock between 10 and 12 a. m. that day for $2,600, to other parties.

We think this last proposition made by defendant to the plaintiff was a new proposition, independent of and disconnected with the first agreement made during the auction sale. At the time the defendant made the last proposition the plaintiff had abandoned the first, and the defendant was in the sole and undisputed ownership of the goods.

He then offered to sell them to plaintiff for $1,880, payable by 12 o'clock, and plaintiff accepted the offer. An offer to buy or sell becomes a binding agreement when the person to whom the offer is made accepts it and communicates his acceptance. 35 Cyc., 52 and 53.

This last contract has no connection with the first, which was an agreement to suppress bidding and void, and can be enforced without calling in the aid of the first or illegal contract.

"A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." *Marshall C. J.,* in *Armstrong v. Toler,* 24 U. S., 257.

The subject is discussed at length in *Electrova Co. v. Insurance Co.,* 156 N. C., 234, and many authorities cited; and in *Jewelry Co. v. Joyner,* 159 N. C., 644, which are cases in point. (131)

2. The plaintiffs Owens and wife Emma also aver in their complaint that the $4,000 note hereinbefore described and secured in the

deed in trust to Foushee is usurious, and they pray affirmatively "that the defendant H. A. Foushee, trustee, be restrained and enjoined from selling the house and lot of plaintiff Emma D. Owens on the first day of July, 1911, as he has advertised so to do, until it can be inquired into and determined by the court what amount, if any, is justly due and owing by the plaintiffs on the note secured by said deed of trust or mortgage."

His Honor seems to have held with plaintiffs that the note contained certain usurious charges, and eliminated them, but in adjusting the matter rested his calculation upon the decision of the Court in *Churchill v. Turnage*, 122 N. C., 426. To this ruling plaintiffs except and ask us to overrule that case.

The principle settled by that case is, that a debtor seeking the aid of a court of equity will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforced against the creditor being the excess of the legal rate. This case was subsequently cited and approved in *Cheek v. B. and L. Association,* 127 N. C., 122.

In *Churchill v. Turnage* no novel principle was promulgated, for the opinion recognizes that "the precedents are both *numerous* and *uniform.*"

The same principle was applied in 1847 in *Ballinger v. Edwards,* where it is held in an opinion by *Chief Justice Ruffin* that "the statute of usury is as binding in a court of equity as at law, except in cases where the borrower asks the assistance of a court of equity, and then the court will compel him to do equity by paying the principal and the legal interest."

To the same effect are the cases of *Gore v. Lewis,* 109 N. C., 539; *Burwell v. Burgwyn,* 100 N. C., 389; *Purnell v. Vaughan,* 82 N. C., 134; *Beard v. Bingham,* 76 N. C., 285.

In *Purnell v Vaughan, Chief Justice Smith* says: "Equity will relieve against usury only upon the borrower's paying the principal
(132) sum loaned and legal interest."

In *Simonton v. Lanier,* 71 N. C., 498, *Bynum, J.,* says: "As the defendants came into this court to ask favors, and this is a court of equity as well as law, they will be required to do equity, that is, to pay the debt and legal interest thereon."

This principle of equity has been so thoroughly engrafted upon our jurisprudence that we do not feel disposed to disturb it. It applies alike to all classes of persons, married or single, and whether principal or surety.

The statute of 1907, chapter 110, Pell's Revisal, 3712a, has been called to our attention, but an examination of it shows that it has no bearing

whatever upon this case, and does not change the principles of equity declared and enforced, in the numerous cases we have cited, for more than half a century. This principle which has been enforced so long in this State is universally followed in other jurisdictions. The Supreme Court of the United States, in passing on the National usury law applicable to National banks (a statute almost exactly like ours), has held in a great many cases that, "It is an established principle of equity jurisprudence that he who seeks the aid of equity to be delivered from usury must do equity by paying or offering to pay the principal and lawful interest upon the money borrowed as a condition of granting the relief asked." Ency. of Supreme Court U. S., 850. In note 69 will be found collected a large number of cases from that Court recognizing and enforcing that principle.

For the reasons given, we are of opinion upon the question of usury his Honor's ruling was correct and must be affirmed.

Upon the other cause of action, relating to the breach of contract in the sale of the stock of goods, there must be another trial.

The costs of this Court will be paid by defendant.

The judgment of nonsuit is set aside and the cause remanded to be proceeded with in accordance with this opinion.

Error.

WALKER, J., dissenting in part: I concur in so much of the Court's opinion as relates to the contract between plaintiff and defendant R. H. Wright, for the purchase of the goods formerly belonging to Smith Company, and sold by the receivers, as my view is that (133) there was evidence of a breach of that contract entitling plaintiff to his damages for the same; but on the other question, as to the usury and the plaintiff's rights in that respect, the view which I take of the law compels me to dissent.

I do not deny that there are a few precedents which apparently support the conclusion reached by the Court, but they do not take into account the provisions of our statutes which bear upon the matter. The Revisal, sec. 1951, declares that "the taking, receiving, reserving, or charging a greater rate of interest than 6 per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it," and "if the greater rate of interest has been paid, the person by whom it has been paid may recover back twice the amount of interest so paid." Where an action is brought to recover the amount of the note, the payee is allowed by the same section to set up the penalty as a counterclaim. We have held, at this term, that the legal effect of this statute is to make the loan one without interest,

where usurious interest was reserved, and of course it becomes so as soon as the note for the loan is executed. *Ward v. Sugg,* 113 N. C., 489; *Ervin v. Bank, ante,* 42. In *Smith v. B. and L. Association,* 119 N. C., 249, it is said: "Where usurious interest is charged, all interest is forfeited, and the legal effect of the contract being simply a loan without interest, all payments, however made, must be credited on the principal, and, in addition, the borrower is entitled to recover, or have credited on the debt, double the amount of payments made as interest within two years prior to action brought." This being so, when the present suit was brought, plaintiff only owed the defendant Wright the amount of the note less the payments; for, as we have seen, these must be applied to the reduction to the principal, and, besides, it must be further reduced by the amount of the penalty. But it is said we are in a court of
(134) equity, and as plaintiff has asked for equity relief, that is, for an injunction to stop the sale by the defendant R. H. Wright, under the mortgage, and that as "he who asks equity must do equity," the plaintiff, contrary to the very words of the statute and also its meaning, as a condition of granting relief, must pay the principal, with legal interest, forgetting that there is no legal interest, as the Legislature, in this very statute, has plainly said there shall be none. This is penalizing the plaintiff instead of the defendant, and entirely reversing the mandate of the law, which, of course, is a repeal of it. No precedent, and especially no badly erroneous precedent, can compel me to disregard and set at naught the clearly expressed will of the people as recorded in our statute. There is no law requiring this Court to do that. If this Court has decided contrary to the statute and thus repealed it, we should retrace our steps, and reinstate it as speedily as possible. The rule of *stare decisis* is not imperative or inflexible, and it has been said that the maxim should not be allowed to stand as an absolute bar in the way of a reëxamination of legal questions previously decided by the same court, if improperly determined, and especially where the decisions reviewed have not passed into a settled rule of property or contract, so that parties may thereafter have been misled in their business transactions. *Colorado Seminary v. Board of Commissioners,* 71 Pac., 410 (30 Col., 507). The Court said, in that case, that it had gone as far as any other appellate tribunal in maintaining the maxim of *stare decisis.* It will be found that this rule, the great efficiency of which is admitted, is confined to decisions which establish rules of property or of contract upon which parties may reasonably have relied in making contracts or in acquiring titles. *Hill v. R. R.,* 143 N. C., 539. *Lord Mansfield* stated it, with its limitations, in *Wyndham v. Chetwood,* 1 Burrows, 419, as follows: "When solemn determinations, acquiesced under, have settled precise cases and

become a rule of property, they ought for the sake of certainty to be observed as if they had originally formed a part of the text of the statute." And the same was said of it in our own cases of *Long v. Walker,* 105 N. C., 109; *Grantham v. Kennedy,* 91 N. C., 151; *Kirby v. Boyette,* 118 N. C., 244; *Young v. Jackson* 92 N. C., at p. 148.

"Where judicial decisions may fairly be presumed to have (135) entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis,* to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law, and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable." 11 Cyc., 755. The reason of the rule of *stare decisis* is stated in *Hill v. R. R., supra,* with a citation of many cases exemplifying it, and showing, I think, conclusively that it does not apply to a case like this. I believe no court has applied it to any case where it was not found that a reversal of the former decision or decisions would unsettle titles or prejudice parties who have made investments or entered into contracts in reliance upon the former adjudication as correct and final. And why should the rule be extended farther than this? There is no construction of a constitution or a statute involved. The former decisions have simply nullified the statute, and there was no attempt to construe, otherwise the result of those cases would have been different. If money lenders have risked their money upon loans drawing usurious interest, it is their own fault, for no man has a license or a vested right to violate the law. A reversal of former decisions will therefore have no harmful effect. A few of them may be caught in the act, but they are mere lawbreakers and entitled to no consideration from the court—simply because, as to this kind of transaction, they are not within the pale of the law. To visit them with the penalties of the law would be but enforcing the will of the Legislature and the policy of the State, as expressed in this statute. It would be a most wholesome decision and a return to the true meaning of the law. If this question were *res integra,* I am quite sure it may safely be said that this Court would be unanimous in the opinion as to the former decisions being erroneous, and plainly so in view of the unambiguous wording of the statute. I refer to (136) the cases cited in the opinion of the Court. There is one recent case apparently to the contrary. *Ward v. Sugg,* 113 N. C., 489. See,

also, dissenting opinion of the present *Chief Justice* in *Churchill v. Turnage,* 122 N. C., 426, where the subject is ably and learnedly discussed and the authorities cited.

This is now only a proceeding to determine how the parties will share in the surplus of the fund realized from a sale of the land under the first mortgage, and for that purpose to ascertain how much is due by the plaintiff to the defendant R. H. Wright. Besides, Wright is claiming usury in this suit, and is, the sum of $1,478.44, as of 1 July, 1911, and he prays judgment for this amount in his answer. Upon the admitted facts, there is no calculation authorized by law by which he would be entitled to this amount. The note was for $4,000, and did not carry interest until twelve months after its date. Plaintiff testified and his testimony must be taken as true, as there was a nonsuit—that he paid $2,987.44 on the note, which would leave $1,012,56, without counting any interest, for the note did not bear interest until after its maturity, 31 August, 1911, and the payments were made as follows:

1909.	
October 6	$ 150.00
December 4	100.00
December 10	50.00
1910.	
January 14	150.00
April 4	1,950.00
1911.	
January 17	197.44
1909.	
August 31	390.00
	$2,987.44

So that, leaving the statute, Revisal, sec. 1951, as construed by
(137) us, out of consideration, there would be only a very small amount of interest to be added to the principal after deducting the total of the payments. But the statute positively declares that where unlawful interest is reserved, the note shall not carry any interest at all; it is, therefore, a noninterest-bearing security. Even if Wright is not to be regarded as the original payee—and I do not think there can be any doubt that he is to be so regarded upon the facts, as they now appear—he took the note with full knowledge of the usury, and therefore, as we will see, the principal of the note must be reduced by the payments and double the amount of the interest. The statute expressly makes the penalty the subject of a counterclaim, Revisal, sec. 1951; *Cobb v.*

Morgan, 83 N. C., 211, and it was held in *Harris v. Burwell*, 65 N. C., 584, overruling *Neal v. Lea*, 64 N. C., 678, that any counterclaim, good under the law against the original payee of the note, shall be good also against his assignee, or indorsee, especially if he purchased the note with notice of the counterclaim. That case construed Code, sec. 177; Revisal, sec. 400.

So in any view of the transaction, R. H. Wright, who knew all the facts, took the note and held it subject to any defense or counterclaim of the makers. R. H. Wright, if not in law the original payee, took the note well knowing that under the law it did not bear interest, and I do not know of any case that holds that, under such circumstances, the right to interest can be revived. There is no authority which holds that this Court can charge interest upon a note which, at the time it was bought by the holder, did not bear interest. It has no more power to do so than it would have if the note, on its face and by agreement of the parties, did not carry interest. In my statement of the payments made by plaintiffs to Wright or for him, and of the balance due on the note we have allowed the plaintiff only for actual payments, without regard to the provision of the statute doubling the amount of the interest paid. If this is done, the credit as of 3 August, 1909, should be $780, which would reduce the balance to $622.56. But there should be a still further reduction, for R. H. Wright paid only $3,660 for the note, and as he is really and in law the original payee, the note having been made with the understanding that he should be the owner of it, that amount is the legal principal. It is all (138) that plaintiff ever received, and that, in law and in good morals is all defendant can justly demand. Deducting from this principal the payments, as above stated, that is, $2,987.44, and there is left $612.56, which is $51.69 less than the amount ($664.25) in Mr. Reade's hands, as trustee under the first mortgage, for distribution. But if we take from this amount the sum of $390, which should be deducted if the penalty is allowed, as the payment of $390 made 31 August must be doubled, we have a balance of $222.56, much less than the amount in the hands of the trustee. So that in any view, starting with a principal of $4,000 and deducting only the payments, but bearing in mind that the note, by its terms, did not bear interest for a year or until after its maturity, we find that defendant R. H. Wright demanded usury when he filed his answer in this case. Deducting the payments during the first year and then allowing him interest on the balance from 31 August, 1910, to 17 January, 1911, when the last payment was made, and then taking off that payment, and there is left $1,040.21, and yet in his answer he demands judgment "that he recover the sum of $1,-

478.44 and interest from 1 July, 1911," and that the $664.25, the amount in Mr. Reade's hands be applied *pro tanto* to its payment. In the case of *Manning v. Elliott,* 92 N. C., 48, *Justice Merrimon,* referring to the maxim that he who asks equity must do equity by paying the principal and legal interest, says it does not apply to a case like this one. "This rule, however, does not apply to the case of a lender of money, who comes into court asking the enforcement of his usurious claim; he would encounter another maxim, which requires him who would sue in a court of equity to come with clean hands."

What are the facts of this case? It must be remembered that the court withdrew the case from the jury and decided, upon the testimony, that plaintiff was not entitled to recover anything, and then entered judgment of nonsuit. This entitles plaintiff to have us take the most favorable view of the evidence in his behalf: When this is done, it

it appears plainly that the transaction which culminated in the
(139) execution of the note and mortgage, while conducted in the name

of J. Henry Smith as payee, was in fact intended for the benefit of the defendant R. H. Wright, and he was the real payee. There is plenary evidence and at least some evidence to show that the name of Smith was merely used that defendant might escape the penalties of the usury. The form of the transaction was merely colorable and intended to disguise the real nature of the transaction. Plaintiff testified that R. H. Wright was present all the time, and his attorneys drew the papers, and they were submitted to Wright for his approval before they were signed, and he actually approved them with certain interlined amendments. Wright went with Owens to see the house and lot of Mrs. Owens, which was to be mortgaged to secure the note, and he told Owens that if he would pay the interest in advance ($240) and convey to him the small triangular lot in Durham, valued by Wright at $50, and also pay him $100 in money as a bonus, or as usury, to call it by its right name, he would buy the note from Owens. This was before the note was executed. The money was paid and the lot conveyed at the request of Wright. J. E. Owens paid the $340 to J. Henry Smith, not for himself, but for Wright, according to Wright's instruction, and Wright was prsent when the payment was made, which was shortly after the execution of the note, but Wright had said it would be all right to wait a day or two. The note was transferred to Wright on 31 August, the day it was given. There was evidence to show that R. H. Wright was the master spirit in the transaction. He dominated the situation and was making an advantageous contract for himself, and not for Owens or Owens & Co. The note was really made to him. Although in the name of Owens, it was for his use and benefit. He is, therefore, to be regarded, in law, as

the real payee. He sought, in the beginning, to enforce payment for the full amount. I think, as matter of law, he must be charged with all the usury. (*Bynum v. Rogers,* 49 N. C., 399; Pell's Revisal, sec. 1951, and cases in notes); but the evidence certainly entitled the plaintiff to have the jury pass upon the transaction in order that they might say whether or not it was usurious as to Wright. 39 Cyc., 1052-1054; *Yarborough v. Hughes,* 139 N. C., 199; *Miller v. Insurance* (140) *Co.,* 118 N. C., 612. In law, he must be considered as the original payee, because he virtually assumed that relation to the note by his dealings in respect to it. The form of the transaction is not regarded so much as the substance, and when we view it as it really was and as it was intended to be, it reeks with usury. The law will penetrate beyond the covering of form and look at the substance and the matter as it really, and in essense, is, however it may seem to be. The outward semblance is of no moment; it is the true character of the thing that determines the rights of the parties. *Gay v. Parpart,* 106 U. S., 699. Look at it but for a moment. R. H. Wright plans the entire scheme. He receives interest ($240) in advance, when no interest was payable until after the first year. In addition to this, he gets $100 as a bonus and a lot worth, by agreement, $50. In other words, they started out by extorting from this plaintiff, who was in necessitous and straitened circumstances, as unlawful interest, $390, and this was done twelve months before any interest began to accrue upon the note. How will we ever enforce the beneficent provisions of this statute if such transactions can be conducted with impunity? Every money lender, especially every usurer, always secures himself by a mortgage or by collaterals, and the poor debtor must always resort to the court to stay his mailed hands until the matter can be investigated; but for this he must pay the penalty of forfeiting his rights under the statute, Revisal, sec. 1951, and, strange to say, the very law that gives the right is made to take it away, simply because the debtor seeks to vindicate it in the courts, the only place where he can ever expect to get relief. Is not this a complete reversal of the maxim that where there is a right there is always a remedy for its enforcement (*ubi jus ubi idem remedium*)? Mr. Broom in his excellent and standard work on Legal Maxims (6 Am. Ed.), marg. p. 192, in explaining this maxim, says that "*jus*" signifies "the legal authority to do or demand something," while "*remedium*" is defined to be the right of action, or the means given by the law for the recovery or protection of the right, and that whenever the law gives a right, it at the same time gives a complete remedy for the same (*lex semper dabit remedium*). "If a man," says he, "has a right, he must, it has been observed in a celebrated case, have (141) a means to vindicate and maintain it, and a remedy if he is injured

in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." I do not think the courts can annex a penalty, or a forfeiture of a statutory right, to the bringing of a suit, by a party aggrieved, for the vindication or protection of that right. Plaintiff is appealing to the court, not for its favor, nor is he invoking the exercise of its discretion, but is asserting, in the legal and rightful, and in the only way, to enforce his statutory right. There is no court of chancery, now, as there was in England, where this peculiar doctrine, set up against this plaintiff's claim and to bar his plain legal right, originated. There is but one kind of court with us, where all kinds of rights are administered. Nor is the writ of injunction now an equitable remedy. It is a legal remedy given by the statute, Revisal, sec. 806, as much so as is arrest and bail, claim and delivery, and attachment. They are only provisional or ancillary remedies, Code, Title IX, 1 vol., p. 110, and *legal* remedies. Plaintiff was, under this statute, entitled to the injunction unconditionally, as a matter of right, and not as a favor from the court. The ancient chancery court, perhaps, had the right to annex a condition to the exercise of its jurisdiction, but not the modern court of law, governed as it is by the mandate of the statute.

It seems to have been overlooked, that this suit is also for the recovery of the penalty, and the equity rule, as it is called, does not apply. *Cheek v. B. and L. Association,* 127 N. C., 121. Nor does it apply where the usurer actually seeks a foreclosure or, as in this case, to recover his debt out of the proceeds of a sale made under a prior mortgage, which is practically the same thing. *Bennett v. Best,* 142 N. C., 168; *Moore v. Woodward,* 83 N. C., 531; *Arrington v. Goodrich,* 95 N. C., 462; *Gore v. Lewis,* 109 N. C., 539. The plaintiffs in this case are not asking for any equity, and, therefore, cannot be required to do equity, and besides, there is no equity to do, unless it can with reason and justice be said that, in order to avail himself of his legal and provisional remedy
(142) given by the statute, Revisal, 806, to prevent his creditors, by a sale under the power contained in the mortgage, from collecting usurious and exortionate interest on his debt, he must surrender valuable legal rights which are given by the law in the execution of a sound public policy. *Atkins v. Crumpler,* 118 N. C., 532; *Smith v. B. and L. Association,* 119 N. C., 249; *Cheek v. B. and L. Association,* 126 N. C., 242; *Ward v. Sugg,* 113 N. C., 489; *Moore v. Beaman,* 112 N. C., 558. Is this an equity? The statute says peremptorily that there must be no interest. We say there must be the legal rate, when there is no rate at all on a usurious contract, and it is a misnomer to call what is now allowed as interest the *legal* rate. Besides, in his answer, defendant seeks to recover

nearly $1,500, which is more, in any view, than he is lawfully entitled to receive, and it can make no difference, in law, whether he seeks to recover it as plaintiff or as defendant. The decision of the Court concedes to the debtor, in theory, everything the statute gives him, until he attempts to assert his statutory right in practice, and against him who violated it, when he loses it at once. Does this not make a dead letter of the statute? It is putting a premium on usury and so intrenches the usurer by compelling the oppressed debtor to do what is called equity, that the former risks nothing in exacting unlawful interest, but is protected in his effort to consummate the wrong. If this be the correct rule, the Legislature will, perhaps, by amendment, make its intention so clear that this anomaly in the law will not again be presented. The fact that the defendant remitted the excess over the amount in the trustee's hands plays no part in this case. It was too late to repent or change his mind. The *locus pœnitentiæ* was gone. The wrong had already been committed. His Honor proceeded upon the wrong theory, for if the calculation had been properly made, the plaintiff was entitled to a large part, if not all, of the fund in Mr. Reade's hands.

If the former decisions apply to this case, they should be overruled, so that a borrower may not be told that as soon as he attempts to enforce his rights he will lose them. I think the new trial should extend to the usurious transaction, and the law correctly administered in regard to that branch of the case.

CLARK, C. J., concurring in dissent of WALKER, J.; Revisal, 1951, provides that "taking or charging a greater rate of (143) interest than 6 per cent per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid."

This statute makes no suggestion that the debtor shall not have this remedy when the creditor shall secure his debt by a mortgage and the debtor shall be forced to take action to prevent sale under the mortgage, and tenders the amount legally due according to the statute. Indeed, this Court wrote such exception into the statute in *Churchill v. Turnage,* 122 N. C., 426, but that case has been cited only once since (and then it was distinguished), in *Cheek v. Association,* 127 N. C., 122. On the other hand, in Revisal, 3712a, which has been enacted since *Churchill v. Turnage,* being chapter 110, Laws 1907, it is provided that when a

mortgage is given on household furniture the penalty is incurred. It was not intended, however, to restrict the remedy to mortgages in such cases, but merely to emphasize the remedy, for Revisal, 1951, contains no exception of any kind.

I concur with *Mr. Justice Walker* that the statute should be followed, and not the exception engrafted upon it by judicial legislation in *Churchill v. Turnage, supra.*

ALLEN, J., dissenting: I concur in the conclusion of the Court as to usury, but do not think what occurred on Saturday between the plaintiff and defendant made a new contract. Under the first agreement, which the Court holds to be invalid, the plaintiff was to pay the defendant $1,470 for the goods and $800 on a note. He failed to get the money, and told the defendant he could not do so. The defendant then said: "I will tell you what I will do: If you will raise $1,880 on this thing,
I will try to hold the offer open until 12 o'clock; but you must
(144) hurry up." This cannot, I think, be a new contract, and it
amounts to no more than changing the amount to be paid in cash under the original contract.

Cited: Cuthbertson v. Bank, 170 N. C., 532; *Yates v. Yates, ib.,* 537; *Corey v. Hooker,* 171 N. C., 231, 232, 238, 240.

ANDY GREER, ADMINISTRATOR, v. DAMASCUS LUMBER COMPANY.

(Filed 20 December, 1912.)

Negligence—Contributory Negligence—Children—Riding on Engine—Permission—Nonsuit—Evidence—Questions for Jury.

Children of tender years are not held to the same degree of care as persons of maturer age upon the question of their negligence; and where a judgment of nonsuit is entered, the evidence being construed more favorably for the plaintiff, and when there is evidence tending to show that children were accustomed to ride on the tailboard of defendant's logging steam locomotive; and that plaintiff's intestate, a child of 10 years of age, was riding upon this tailboard in front of the backing locomotive, with the permission and knowledge of defendant's engineer and fireman; that the father of deceased, seeing the danger, shouted and unavailingly warned the fireman thereof, who was then running the engine, and the intestate, being frightened, attempted to jump from the slowly moving engine, to her death, a question for the jury is presented as to whether the defendant's negligence in not exercising the proper care to avoid the injury and death was the proximate cause thereof, or the contributory negligence of the intestate in attempting to jump from the engine under the circumstances.

APPEAL by plaintiff from *Allen, J.*, at July Term, 1912, of ASHE.

This is an action to recover damages for causing the death of the plaintiff's intestate by the negligence of the defendant, as alleged in the complaint. The defendant is a corporation owning a lumber plant and operating logging trains, and was running one of its trains at the time hereinafter mentioned. On or about 15 December, 1910, the deceased, about 10 years old, and her brother, a small boy, were at a water tank on defendant's road near Gentry's Creek, Tenn. The children lived about 4 miles from this place, at Stikesville, N. C. While the children were at the tank the defendant's logging train pulled (145) up and stopped there to get water. The children had seen other children ride on defendant's train and had been permitted to ride themselves, so they asked the fireman to let them ride on the engine, across the mountain, to their home. He gave the permission, and they got on the tailboard of the tender of the engine, a little step used by brakemen in switching. He gave them permission to ride in this position. It was customary to let children ride on the train when they asked to do so. About halfway up the mountain, the logging train went out on a switchback, a "device" for reversing the engine so as to "grade" the mountain. At this place, the flagman saw the children and spoke to them, but never told them to get off, nor did he tell them that they were in a dangerous position. The engine moved ahead with the children on the tailboard. When the train reached a point about 79 steps from the home of the deceased, her father saw his children on the tailboard and in a dangerous position. He had forbidden the trainmen to permit his children to ride on defendant's trains. The train was in full view of his house all of the way from the place where he saw the children to the place where the little girl was killed. On seeing his children in a dangerous position, he ran out and hailed the fireman and conductor and signaled to them that the children were in a perilous situation, and for them to stop, so that the children could step off. He gave the signal to stop, and continued to halloo and to give signals uptil the little girl was injured. He knew the right signal, as he had been a track-walker. The fireman and engineer were looking at him, but failed to stop. They could have heard him but failed to stop. They could have heard him, for the son, who was on the tailboard with the deceased, heard his halloo. The engine passed by him, within a few feet of him, and all of the time he was trying to get them to stop and let the children off, but they would not. After the engine had passed by the place for the children to get off, the little girl jumped off or fell off. She fell on the track, the engine ran over her, and from her injuries she died. The fireman, who let them get on the engine, knew where they lived. The fireman could see the

children on the tailboard, and the egineer could also, at the (146) switch. He could have seen the little girl when she fell, if he had been looking. The engine was moving very slowly and he was not attending to his duties at the time. The engine could have been stopped within a foot or 2 feet. It moved 8 or 10 feet after the little girl fell, before it struck her. After it struck her, it dragged her in the wheels for 15 feet or more. When she fell, her brother gave the alarm, but the engine was not stopped until the deceased's brother had taken her out of the wheels by the hair of the head, after the engine had reversed its course to go onto another track.

After hearing the testimony, the court nonsuited the plaintiff, and he appealed.

Charles B. Spicer for plaintiff.
T. C. Bowie for defendant.

WALKER, J., after stating the case: As this is a nonsuit, we must consider the evidence in the most favorable view for the plaintiff. *Beck v. Bank, post,* 201, and cases cited. The question is, whether there was any evidence which should have been submitted to the jury, and we are of the opinion that there was. We do not rest our decision of the case upon the ground that the fireman permitted the two children to ride on the engine (*Dover v. Manufacturing Co.,* 157 N. C., 324), but rather upon the ground of there being evidence that the fireman and flagman knew they were children of tender years and immature judgment, and that they were on the tailboard of the tender, an exceedingly dangerous place, and that they were not capable of exercising that degree of care for their safety which a grown person would under the same circumstances. It is their extreme youth and their perilous position which combine to make a case of actionable negligence on the part of the defendant, the want of proper care being the proximate cause of the girl's death. We considered a somewhat similar question in *Ferrell v. Cotton Mills,* 157 N. C., 528, and some of the principles discussed in that case are applicable here. Every person should so use his own property as not to injure another, is an ancient maxim of the law, which has survived in its full vigor to the present time. It was said in *Ferrell v.* (147) *Cotton Mills, supra:* "Although the dangerous thing may not be what is termed an attractive nuisance, that is to say, not have especial attraction for children by reason of their childish instincts, yet where it is so left exposed that they are likely to come into contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so

exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them." This principle is substantially the same as that applied in the "turntable cases," *R. R. v. Stout*, 84 U. S., or 17 Wallace, 657 (21 L. Ed., 745). In the latter case, the following instruction of *Judge Dillon* to the jury was not only approved, but commended, as an impartial and intelligent statement of the law, all of which will appear by reference to *R. R. v. McDonald*, 152 U. S., 262 (38 L. Ed., at p. 440), where this charge is given as follows: "The machine in question is part of the defendant's road, and it was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence." We refer especially to the *Stout* and the *McDonald* decisions, for the reason that they discuss with great clearness the principles upon which is based the right of recovery in behalf of children in such cases, and cite the principal authorities. We may well add, that if a turntable is a dangerous instrumentality if unlocked or unguarded, surely the tailboard of a backing engine must be. *Kramer v. R. R.*, 127 N. C., 328. Right here we lay out of the case, as a conceded proposition of law, or rather an indisputable one, that all that is required of an infant plaintiff in such a case is that he exercise care and prudence equal (148) to his capacity, or such as is usual among children of his age and supposed intelligence. *Murray v. R. R.*, 93 N. C., 92; *R. R. v. Gladman*, 82 U. S., 401; *Bottoms v. R. R.*, 114 N. C., 699. The child's negligence was a question for the jury under proper instructions.

We, therefore, recur to the further consideration of the main question as to defendant's negligence, and in regard to it, we find that the courts have practically decided this very point, upon facts closely resembling those in this case, and sufficiently so to make their decisions valuable, if not authoritative, precedents. A case much like ours is *Ashworth v. R. R.*, 116 Ga., 635 (59 L. R. A., 592), where the facts and governing principle are thus stated: "The plaintiff was on the running-board of an engine which was moving backwards, and, according to the allegations of the petition, the servants of the defendant company had, as reason-

able persons, sufficient grounds to anticipate his presence upon the engine, and in legal contemplation knew he was there, were aware of his perilous position, and yet took no steps to protect him against his ignorance and inexperience. The allegations of the petition make a case of wanton and willful injury; not willful in the sense of intentional, but willful in the legal sense, growing out of a failure to anticipate the plaintiff's presence and provide against his injury, when it should have been done." The following cases cited by the Court in support of its decision are pointedly applicable to the case at bar: *R. R. v. Popp,* 96 Ky., 99; *Thompson v. R. R.,* 11 Tex. Civ. App., 307 (child was 12 years of age); *Tully v. R. R.,* 2 Pen. (Del.), 537; *R. R. v. Abernathy,* 28 Tex. Civ. App., 613 (child was 10 years old). In those cases or at least some of them, the employees of the railroad company did not know that the children were on the train, although there were circumstances from which they might have anticipated their presence there, and the Court said that "it devolved upon the employees to use ordinary care to ascertain whether or not some were on the train, and prevent injury." (149) But in our case there was direct evidence that some of the employees did know that the little boy and girl were on the tender, and in a very dangerous place. The injury resulted, too, just as the employees might have anticipated, in the exercise of proper forethought. The child became frightened as the engine passed by her home, where she expected to alight from the engine, and she did what was natural for one so young to do under the circumstances, and thereby was mangled and lost her life. An adult, in all probability, would have stayed on the engine until it had stopped and it was safe to alight, but not so with an infant of much less discretion and judgment. She instinctively did what children so often do when alarmed, and sometimes adults—the wrong thing. In this connection, the case of *Holmes v. R. R.,* 207 Mo., at p. 164, is pertinent: "But common experience tells us that a child may be too young and immature to observe the care necessary to his own preservation, and therefore, when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact and he cannot indulge the presumption that the child will do what is necessary to avoid an impending danger. Therefore, one seeing such a child in such a position is guilty of negligence if he does not take into account the facts that it is a child, and regulate his own conduct accordingly. An act in relation to a person of mature years might be free from the imputation of negligence, while an act of like character in view of a child would be blameworthy. Therefore, when the law says to the defendant, although the act of the deceased child contributed with your act to produce the result, yet, because of his youth and immaturity, he

is not adjudged guilty of negligence, it does not charge the defendant with the consequence of the child's conduct, but it does not, for that reason, excuse it for its own negligence." The following cases may be added to those already cited: *Biddle v. R. R.*, 112 Pa. St., 551; *Leven v. Traction Co.*, 194 Pa. St., 156; 201 Pa. St., 58; *Brennan v. R. R.*, 45 Conn., 284; *Cook v. Navigation Co.*, 76 Texas, 353; *Davis v. R. R.*, 92 S. W., 831; *Wynn v. R. R.*, 91 Ga., 344; *Construction Co. v. Bostick*, 83 S. W., 12; *Oil Co. v. Jarrand*, 40 S. W., 531.

In *R. R., v. Abernathy, supra,* the facts were that a boy 10 years old and of ordinary intelligence was told not to go about the train, (150) as he might be killed or hurt, but was not told how it might occur. Just before the accident, he was seen on the pilot of the tender, which was part of a work train, near his father's premises, and in some way, while the train was moving slowly, he was thrown or fell from the pilot, and was killed. It did not appear that the employees of defendant knew that he was there, although there were circumstances from which they might have discerned his dangerous position. The Court held that it was a case for the jury. And so in *Biddle v. R. R., supra,* it was said, generally, to be very true that extra precautions are not required to guard against the intrusions of trespassers, even though they be children, "but when they do so intrude, and are known to be in an improper place, they must not be so wholly neglected as to endanger their lives or limbs. Any other doctrine would so illy accord with Christian civilization as to render its maintenance impossible. It follows from what we have said that the court below, instead of ordering a peremptory nonsuit, ought to have sent the case to the jury." *R. R. v. Burgess,* 119 Ala., 555; 72 Am. St., 943. It would serve no good purpose to prolong the discussion of the subject.

The reasons we have given and the authorities cited would seem to be sufficient to show the error in withdrawing this case from the jury and directing a nonsuit. There are other facts and circumstances which entitled the plaintiff to be heard by a jury, which we have not, as yet, noticed. It is in evidence that it was customary for children to ride on the engine or tender, a most dangerous practice. The defendant should exercise more care and prudence in such matters. Besides, when the train approached the father's home, he signaled the engineer and fireman to stop, as he had seen his two children in a dangerous position on the tailboard, and became apprehensive for their safety; but his frantic warning was not heeded, although he was seen, so he says, and should have been heard, so the boy said, by them. This was evidence of negligence to be submitted to the jury. Of course we have considered the case as if the evidence adduced by the plaintiff gives a correct account

of the matter, as we are required to do under the well-established rule, because the jury may have found it to be so if it had been sub-
(151) mitted to them. It may be that the defendant will be able to satisfy them, upon all the evidence, that such is not the case, and a very different view of the question may be presented to them. The error of the court consists in not giving the plaintiff the opportunity of having the facts passed upon by the jury, when there was some evidence of negligence.

New trial.

C. E. ROPER ET ALS. v. NATIONAL FIRE INSURANCE COMPANY, THE DIXIE FIRE INSURANCE COMPANY, AND THE PETERSBURG SAVINGS AND INSURANCE COMPANY.

(Filed 4 December, 1912.)

1. Insurance, Fire—Standard Form—Change of Title—Possession—Forfeiture—Interpretation of Statutes.

A deed of assignment conveying all the property of insured, made after policies of fire insurance had been issued on the property, and which empowered the trustee to sell and execute deeds in fee and apply the proceeds in payment of insured's debts, comes within the forfeiture clauses of the standard fire insurance policies prescribed by our statute, Revisal, sec. 4762 *et seq.*, and invalidates the policy, not being an unconditional and sole ownership of the property insured; the subject of insurance being a building on ground not owned by the insured in fee simple, and a prohibited change in the title or possession of the subject of the insurance.

2. Same—Personal Property.

A deed of assignment subsequently made to the issuance of a policy of fire insurance, including personal property of the insured covered by the policy, is a violation of the sixth clause of the standard or statutory form of policy, being such an encumbrance as is contemplated by the statute, and invalidates the policy.

3. Same—Concurrent Insurance.

A deed of assignment for general creditors conveying property embraced in an insurance policy divests the title of the insured therein, and avoids the policy under the statutory forfeiture clauses requiring that the interest of the insured be truly stated in the policy, and that the insured shall not after the issuance of the policy "procure any other insurance, whether valid or not, on property covered in whole or in part by" the policy.

4. Same—Misrepresentations.

When under a fire insurance policy the insured has violated the provisions of the policy by placing more concurrent insurance on the property than the policy permits, the policy is invalidated, in accordance

with the statutory form, as a concealment or misrepresentation "in writing, or otherwise, of any material fact or circumstance concerning (the) insurance or the subject thereof."

5. Insurance, Fire—Principal and Agent—Waiver.

An agent of a fire insurance company, whether general or local, cannot waive the requirements of a standard policy except in the manner and form prescribed by the statute.

6. Same—Adverse Interests—Imputed Knowledge.

A trust company having acted as the agent of certain fire insurance companies, subsequently was made the trustee in a deed of general assignment for the benefit of insured's creditors, of which it was one, which conveyed all the property of the insured covered by his policies, and the policies were continued in force by the trust companies without the knowledge or acquiescence of the insurance companies: *Held*, the acts of the trustee as agent for the companies could not be considered as binding upon the latter, or as done with their knowledge, for the interest of the agent was antagonistic to that of the companies, and could not be considered as a waiver by the companies of their rights under the policy contract.

7. Appeal and Error—Consolidated Cases—Service.

When it appears of record that several cases on appeal to the Supreme Court were consolidated by consent and duly served in that form, and the parties made common cause in its prosecution, a motion to dismiss and affirm the judgment below made by one of the appellees on the ground that appellant had not served the case on him, individually, or on his counsel, will be denied.

8. Insurance—Policies — Special Clauses—"Mortgages"— Involuntary Bankrupts—Forfeitures.

A provision in a rider attached to a policy of fire insurance, to the effect that the right of a mortgagee shall not be affected by any acts or negligence on the part of the insured, differs from an ordinary "loss payable" clause; and where the interest of the mortgagee is insured under such a policy, and the mortgagor, has made a conveyance which would avoid the policy as to him, and the mortgagee is a bankrupt, and has assigned the note and mortgage to his trustee in bankruptcy, who thus held them at the time of loss by fire, the adjudication in bankruptcy, when involuntary, does not avoid the policy as to the interests of the mortgagee.

9. Insurance, Fire—Policies—Special Clauses—"Mortgagees"—Material Men—Liens—Forfeitures.

Material men who have not perfected their lien on a building covered by a policy of insurance, and which was destroyed by fire, have no insurable interest, but only an inchoate right, and cannot recover under the New York and New Jersey standard mortgage clause, providing, "Loss or damage, if any, under this policy shall be payable" to the insured or mortgagees (trustees), as interest may appear.

10. Same.

The New York or standard mortgage clause in a fire insurance policy does not include a lien upon the insured building of one furnishing material in its construction, and their interests are lost when the insured forfeits his rights under the policy.

11. Insurance, Fire—Policies—Standard Forms—Forfeit — Uses — Rights of Mortgagee—Personal Property—Knowledge.

When the assured has forfeited his right to recover damages under his fire insurance policy, containing only the usual "loss payable" clause, the rights of his mortgagee, recognized in the policy, are not superior to his, and must fall within the forfeiture clause of the contract; especially does this apply to personal property contained in the mortgage of which the company was unaware until after the fire, causing the damage, had occurred.

APPEAL by plaintiffs and defendants from *Justice, J.*, at July
(153) Special Term, 1912, of HENDERSON.

The above entitled three civil actions were consolidated by consent, and tried together at July Special Term of HENDERSON, *Justice, J.* The actions were brought to recover for loss by fire upon policies of insurance issued by each of the above defendants, viz.: The National, 20 May, 1910, $5,000; The Dixie, 12 October, 1910, $3,000; and the Petersburg, 14 January, 1911, $3,000.

From the judgment rendered, the plaintiff Roper and each of the defendants appealed.

J. H. Merrimon, Smith, Shipman & Justice for plaintiff.
(154) *H. G. Ewart for G. H. Valentine.*
F. S. Spruill, A. L. Brooks, Michael Schneck for defendants.

PLAINTIFF'S APPEAL.

BROWN, J. The court below ruled that upon the entire evidence plaintiff was not entitled to recover of either of the defendants.

The three contracts are the standard policies established by the act of 1899, Revisal, secs. 4762, 4833. Each contains the following forfeiture clauses:

(1) This entire policy shall be void if the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; (2) or if the interest of the insured in the property be not truly stated herein; (3) this entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has or shall hereafter make or procure any contract of insurance, whether valid or not, on property covered in whole or in part by this policy; (4) or if the interest of the

insured be other than unconditional and sole ownership; (5) or if the subject of insurance be a building on ground not owned by the isured in fee simple; (6) or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage; (7) or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupancy without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise.

The entire evidence shows that at the time of the loss the plaintiff had violated all of the above provisions of the polices, three of which, the fourth, fifth, and seventh, apply alike to all three policies.

On 15 October, 1910, after policies of the National and Dixie had been issued, the plaintiff Roper, individually and as executor of F. A. Roper, executed a deed of assignment, irrevocable, conveying all of the property insured to the plaintiff the Wanteska Trust and Banking Company to secure creditors, of which the trustee was one, and (155) empowering the trustee to sell and execute deeds in fee and apply the proceeds in payment of debts.

That this avoids the policies is too well settled to need discussion. *Sossaman v. Insurance Co.*, 78 N. C., 147; *Biggs v. Insurance Co.*, 88 N. C., 143; *Hayes v. Insurance Co.*, 132 N. C., 702; *Weddington v. Insurance Co.*, 141 N. C., 234; *Modlin v. Insurance Co.*, 151 N. C., 41; *Watson v. Insurance Co.*, 159 N. C., 638.

The Dixie policy, 12 October, 1910, insured the hotel building for $1,000 and the furniture for $2,000. The plaintiff Roper, on 6 May, 1910, executed a deed in trust to W. A. Smith, for J. M. Stepp, conveying the furniture. This was also a violation of the sixth clause of the policy hereinbefore set out, viz.: "If the subject of insurance be personal property and be or become encumbered by a chattel mortgage." *Weddington v. Insurance Co., supra.*

As to the Petersburg policy, the undisputed facts are that at the date thereof, 14 January, 1911, the plaintiff Roper was not the owner of said property, and had no title thereto. Both he and the Wanteska Company knew that Roper had irrevocably assigned the property in fee to pay creditors, among whom was the Wanteska Company. This was a clear forfeiture under the second clause, to wit, "if the interest of the insured be not truly stated herein."

This policy, as well as the National, was also forfeited for violation of the concurrent insurance provision, viz.: "If the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

By reference to the Petersburg policy, it will be seen that only $8,000 concurrent insurance was allowed, whereas at the time of the fire there was $11,000 of insurance in effect.

This contract of insurance is further invalidated on account of the matters hereinbefore set out under specification one, as avoiding the policy, to wit: "If the insured has concealed or misrepresented in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof."

(156) As will appear from the Petersburg policy, the amount of concurrent insurance was concealed, as this was the last policy written. The amount of the total encumbrances upon the property was concealed, and, finally, the fact that the insured had no interest or title in the property, and that possession of same had been delivered to the Wanteska Trust and Banking Company, was concealed from the company.

Any one of the above specified acts is sufficient to prevent a recovery upon this contract.

To avoid the consequences of these acts, it is contended that there was a waiver of the forfeiture clauses of the policies, as they were issued by the Wanteska Trust Company, the agent of each of these defendants, and that the knowledge of their agent, although undisclosed to the defendants, will be imputed to them. It is admitted that the defendants had no other notice.

In our view, this position cannot be sustained, as there is no written waiver written upon or attached to the policy as required by the statute.

In the well-considered opinion of this Court by *Mr. Justice Connor* in *Black v. Insurance Co.*, 148 N. C., 169, it is held that, "The condition expressed in the statutory form of a fire insurance policy that 'no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this policy, etc., unless such waiver, if any, shall be written upon or attached hereto,' does not restrict the power of such officer, etc., to waive such condition, but establishes an invariable rule of evidence as to such waiver and renders parol evidence thereof inadmissible."

That this applies to general agents with power to bind the company (as defined in *Grubbs v. Insurance Co.*, 108 N. C., 472), is expressly held in the *Black case,* for the opinion assumes that the agent who issued Black's policy was a *general* agent (page 172).

To the same effect is *Quinlan v. Insurance Co.*, 133 N. Y., 356, in which it is held that it is immaterial whether the agent is a general or a special one, for the power of one may be limited as well as the other.

(157) In our case the limitation is fixed by law and not by the parties. It is prescribed by statute, and cannot be waived except in

manner and form as therein prescribed. 13 Am. and Eng., 223. A wealth of authority is cited in the *Black case*, and we can add nothing to what is there so well said.

The Wanteska Company is a plaintiff in this action, and its interests have been, and are now, adverse to its principals. When it accepted the assignment of the property to secure its own and other debts, it was not acting for the defendants and not within the scope of its agency.

The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty; and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal is not charged with the knowledge of the agent acquired therein. 31 Cyc., p. 1595, and cases cited.

It was against the interest of the Wanteska Company to disclose these transactions to the defendants, as they would have canceled the policies at once.

This principle of imputed knowledge does not apply when it would be against the interest of the agent to make the disclosure. *Stanford v. Grocery Co.*, 143 N. C., 420; *Bank v. Burgwyn*, 110 N. C., 267; *Brite v. Penny*, 157 N. C., 114.

As was said in *Barnes v. Trenton Gas Light Co.*, 27 N. J., Eq., 33, "His interest is opposed to that of the corporation, and the presumption is not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it."

In the three cases consolidated the judgment of the Superior Court upon the plaintiff's appeal is affirmed. The plaintiffs will be taxed with the costs.

Affirmed.

The motion of plaintiff G. H. Valentine, trustee of Stepp, to dismiss the appeal and affirm the judgment as to him on the ground that the case on appeal was not served on him individually or on his (158) counsel, H. G. Ewart, is denied.

The record shows that the cases were consolidated by consent and that the plaintiffs and all the counsel made common cause in the prosecution. The case on appeal was duly served and made up.

Motion denied.

DEFENDANTS' APPEAL IN THE ABOVE CONSOLIDATED ACTIONS.

BROWN, J. As we have held on the plaintiffs' appeal, the court below correctly held that C. E. Roper, the insured, cannot recover of either

of the defendants. The court, however, adjudged that plaintiff G. H. Valentine, trustee in bankruptcy for J. M. Stepp, mortgagee named in the National policy, recover of said company $3,200, the mortgage indebtedness, and be subrogated to the rights of the mortgagee; that the plaintiff A. L. Holmes, contract creditor named in the policy, recover of the Dixie Company, $1,000; that plaintiffs Clarke Hardware Company and Rigby-Morrow Company, material lienors, recover of the Petersburg Insurance Company, $2,407.

The defendants by proper exceptions and several prayers for instructions, which were refused, bring before us for review the correctness of such judgments.

THE NATIONAL POLICY.

This covered $5,000 on the building and contained what is called a New York and New Jersey standard mortgage clause attached as a rider to the policy, the effect of which is to provide that the right of the mortgagee Stepp shall not be affected by any acts or negligence on the part of Roper, the insured.

It insures the interest of the mortgagee Stepp, and in that respect differs materially from an ordinary "loss payable" clause. The premiums having been paid, it is therefore incumbent on the defendant company to show some act of the mortgagee which avoids the policy as to him.

(159) The proof shows that Stepp was adjudicated a bankrupt on 31 March, 1911, and plaintiff Valentine was appointed trustee in bankruptcy, and the note and mortgage on the property afterwards burned, were duly assigned to him, and that he held them at the time of the fire.

Concerning the duty of a mortgagee under this clause, Mr. Ostrander says: "The interest of the mortgagee is so far recognized in particular cases that, besides being named as the payee, there is attached to the policy a special stipulation for his better protection. This stipulation is to the effect that the policy shall not be invalidated as to the mortgagee's interest because of any act or neglect of the mortgagor. For this surrender by the insurer of important contract rights expressed in the policy which are either annulled or qualified by the stipulation, the mortgagee promises to give notice of any change in the ownership of his property or increase of hazard which comes to his knowledge."

We are of opinion that the adjudication in bankruptcy, being an involuntary act upon the part of Stepp, did not avoid this policy. There is respectable authority to be found to the contrary, but this Court has held in *Pants Co. v. Insurance Co.*, 159 N. C., 78, that the appointment of a receiver for the property of a corporation is not ground for for-

feiting a policy of insurance on the property of the corporation. In the opinion in that case the authorities are cited, and we regard it as analogous to the case of the National policy.

In this appeal by the National Fire Insurance Company of Hartford we think the assignee Valentine is entitled to recover, and the judgment of the Superior Court upon this policy is affirmed.

Let the defendant National Fire Insurance Company of Hartford pay the costs of appeal in this particular case.

THE PETERSBURG POLICY.

To this policy was attached a New York and New Jersey standard mortgage clause, declaring the "loss or damage, if any, under this policy shall be payable to Clarke Hardware Company and Rigby-Morrow Company as mortgagees (or trustees), as interest may appear.

The parties named in this mortgage clause as holding mortgages or deeds of trust, instead of holding mortgages or deeds of trust as represented, *were at the time creditors of the plaintiff C. E. Roper* (160) *for materials furnished for the building which was subsequently burned.* On 14 January 1911, the date of the issue of the policy, these creditors had only an inchoate right of lien for materials furnished; that is to say, they had not filed their liens, nor did they file them until nearly two months later, to wit, 16 March, 1911.

The contract of insurance being void as to Roper, the plaintiffs Hardware Company and Rigby Morrow Company cannot recover under the mortgage clause, for at the date the policy was issued they held no mortgage or other insurable interest on the property and cannot bring themselves within the terms of the policy. They were then only simple contract creditors with an inchoate right to file a lien, which was not done until two months after the policy was issued.

The plaintiffs were not either mortgagees, trustees, or lienors when the policy was issued. Revisal, secs. 2026-2029; *Clarke v. Edwards,* 119 N. C., 120; *Lumber Co. v. Hotel Co.,* 109 N. C., 661. A mortgage has priority over a lien for materials furnished. *Cox v. Lighting Co.,* 152 N. C., 164.

Yet another reason why the language, "mortgagee or trustee," cannot be held to embrace lienors claiming under material liens is that, as against a mortgage or deed of trust, the grantor has no right of homestead, whereas as against material liens the debtor is entitled to his homestead. *Broyhill v. Gaither,* 119 N. C., 443; *Cumming v. Bloodworth,* 87 N. C., 83; *Cheeseborough v. Sanatorium,* 134 N. C., 245.

At the date of the issue of the policy the Clarke Hardware Company and the Rigby-Morrow Company held no insurable interest in the property, and that is essential in order to take benefit under the New York

and New Jersey standard mortgage clause. These plaintiffs could only claim as ordinary creditors under an ordinary loss payable clause. Their claim under that was forfeited by the act of Roper, the insured, as we will later show.

For these reasons we are of opinion that his Honor erred in rendering judgment in favor of the said plaintiffs, and that they are not (161) entitled to recover.

THE DIXIE POLICY.

This policy was issued 12 October, 1910, and the deed of assignment by Roper to that company was made 15 October, 1910. This policy covers $1,000 on the building and $2,000 on furniture, and contains a simple loss payable clause (not a standard mortgage clause) in favor of plaintiff Holmes, who held a deed in trust on the real property insured for $3,300.

This is the only mortgage indebtedness referred to in the Dixie policy, and of the existence of this and of the other three mortgages and deeds of trust, two of which were executed to the Wanteska Trust and Banking Company, the defendant had no knowledge until after the fire. No indorsement in writing was made and no word of notice given.

The court, holding the policy in the Dixie Fire Insurance Company void as between Roper, the assured, and the company, held that A. L. Holmes, named in the contract of insurance as a contract creditor, with only a loss payable clause, was entitled to recover judgment of the defendant to the extent of $1,000, the amount of the policy written upon the building, in like manner as if there had been in the policy a New York and New Jersey standard mortgage clause.

His Honor properly held that Holmes could not recover any part of the insurance upon the furniture under the loss payable clause, as he held no mortgage, and Roper, the insured, had forfeited the policy by his own act under the authority of *Weddington v. Insurance Co.,* 141 N. C., 235.

This leaves to be considered the question of the validity of the $1,000 covered by this policy on the hotel property. The court held that the policy was void as to the insured Roper. Can A. L. Holmes, the mortgagee to whom the policy was made payable as his interest should appear, recover upon this contract independent of the right of the insured, Roper?

It will be observed that this rider is not what is known as the New York and New Jersey standard form, but contains merely a loss (162) payable clause. In such cases the courts with unanimity hold that the mortgagee acquires no greater rights than those enjoyed by the mortgagor insured. Such a clause amounts merely to a designa-

tion of the person to whom the policy is to be paid in case of loss, and not to an insurance on his own behalf. *Building Association v. Insurance Co.*, 83 Iowa, 647.

"He is a mere appointee, whose right is not an independent one, but is a mere right to receive the whole or a part of the money to which the insured may be entitled." *Wonderlich v. Palatine Fire Insurance Co.*, 104 Wis., 395.

Cooley says that the rights of the appointee under an ordinary loss payable clause are wholly dependent upon the right of the insured to recover, and any act of the latter in violation of the conditions of the policy will also forfeit the rights of his appointee. Briefs on Insurance, p. 1520.

Mr. Ostrander, commenting on the rights of a mortgagee under an ordinary loss payable clause as distinguished from the New York and New Jersey standard mortgage clause, says:

"When a mortgagor procures insurance in his own name, and a loss occurs, the mortgagee can claim no benefit. If, however, the policy is indorsed, 'Loss payable to the mortgagee,' he is then entitled under the policy to receive any money which the insurer is liable to pay under the policy, but the making of the mortgagee the payee of the policy does not in any essential particular change the relations theretofore existing between the insurer and the mortgagor. The latter is still bound by the covenants of the contract, and any failure to perform the conditions precedent will discharge the insurer. The mortgagee can take no more than is due the mortgagor, and if by reason of any act or neglect of the latter an avoidance has resulted, the former has no remedy."

Mr. Cooley, on p. 1227, again says: "Therefore, if the insured could not recover, there was nothing on which the mortgagee could base his right to recover. It seems to be the theory generally that a policy taken out by the owner, payable to the mortgagee as his interest may appear, is directly on the owner's interest, and therefore the mortgagee's right is wholly dependent upon the validity of the policy in the hands of the insured." (163)

Flanders on Fire Insurance, p. 441, says: "Where the policy provides that the loss, if any, is payable to another (to a mortgagee, for example), instead of the insured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy; hence, it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being on the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and, of course, none is recoverable by his assignee or appointee."

See, also, *Brecht v. Insurance Co.*, 18 L. R. A., N. S., 197; *Insurance Co. v. Hullman*, 96 Ill., 154; *Saving Institution v. Insurance Co.*, 119 Mass., 240; *Savings Association v. Fire Insurance Co.*, 44 N. Y. S., 929; 16 App. Div., 589; *Lindly v. Orr*, 83 Ill. App., 70; *Rackley v. Scott*, 61 N. H., 140; *Carter v. Rockett*, 8 Paige, 437; *Baldwin v. Insurance Co.*, 105 Iowa, 379.

It having been adjudged that Roper, the insured, had avoided the policy by his own act, and cannot recover, it necessarily follows that Holmes, the mortgagee, cannot recover under the ordinary loss payable clause, and that the court below erred in rendering judgment in his favor.

The judgments on the defendants' appeal are reversed.

The costs will be taxed against the plaintiffs, except in the appeal of the National Fire Insurance Company of Hartford, wherein Valentine is plaintiff.

Error.

HOKE, J., concurring: I concur in the disposition made of these cases, but do not wish to be understood as acquiescing to the proposition that the provisions of the standard policy forbid or affect the doctrine of parol waiver on the part of insurance companies through the acts and assurances of their general agents. For the reasons stated in my dissent in *Black v. Insurance Co.*, 148 N. C., 169, I do not think the standard policy as set out and continued in our statute was designed or intended, under ordinary conditions, to affect the doctrine of
(164) waiver at all. In the case before us, however, I am inclined to the opinion that the question of waiver is not presented, being controlled or removed by the fact of the dual interest existent in the company's agent, and for that reason I concur in the result.

I am authorized to say the CHIEF JUSTICE concurs in this position.

Cited: *Hayes v. Pace*, 162 N. C., 289; *Cottingham v. Ins. Co.*, 168 N. C., 261.

WILLIAMSON MENEFEE v. RIVERSIDE AND DAN RIVER COTTON MILLS.

(Filed 20 December, 1913.)

1. Corporations, Foreign—Process—Service of Summons—Director—Interpretation of Statutes.

Service of summons, in an action brought by a citizen and resident of this State, against a foreign corporation, which has no property and does not conduct its business here, is valid if made on its director, who is a citizen and resident of this State, under the provisions of Revisal, sec. 440 (1), the restrictions as to doing business and owning property here, etc., not applying to officers of this character.

2. Appeal and Error—Indemnity—Wrong Party—Action Dismissed—Reading Complaint.

In this action against a foreign corporation and its indemnity company wherein a copy of the policy was not attached to the complaint and the reading of the latter did not disclose whether the indemnity company was a necessary party, and this could not be ascertained until the evidence was in: *Held*, the reading of the complaint against the indemnity company in the presence of the jury, and the judge afterwards dismissing the action as to it on defendant's motion, is not reversible error.

WALKER and BROWN, JJ., dissenting.

APPEAL by defendant from *Daniels, J.*, at May Term, 1912, of ALAMANCE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

A. L. Brooks and C. A. Hall for plaintiff.

Morehead & Morehead, Sapp & Williams, and F. P. Hobgood, Jr., for defendant.

CLARK, C. J. This is an action for damages for personal in- (165) juries. The defendant entered a special appearance and moved to strike out the return of the service of the summons for the reason that "the defendant is a foreign corporation not doing business in North Carolina, and has not been domesticated and has no agent upon whom service can be made, and the service is invalid and does not amount to due process of law." The motion was overruled and the defendant excepted. The defendant then answered, and the cause was tried upon its merits. From the verdict and judgment the defendant appealed.

The court found as a fact that the defendant is a Virginia corporation and did not have at the commencement of this action and has not now

any office or place of business in this State, and has never engaged in business here; and it has never had a process agent in this State nor been domesticated here; that T. B. Fitzgerald, upon whom the summons was served, is a director of the defendant company and is a resident of this State, but he was not at the time of the service nor at any time prior thereto transacting the business of the company and held no office therein other than that of director, and that the defendant has no property in this State. Revisal 1905, sec. 440 (1), provides as to service of summons: "If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof; . . . but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein, or when the plaintiff resides in the State, or when such service can be made within the State, personally upon the president, treasurer, or secretary thereof." The construction of this statute, which has been uniformly followed, in *Cunningham v. Express Co.*, 67 N. C., 426, and all cases since, is thus clearly stated by *Hoke, J.*, in *Whitehurst v. Kerr,* 153 N. C., 76: "Construing a statute of similar import, it has been held that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations, both domestic and foreign. Then follows the proviso as to who (166) shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause shall only be good as to foreign corporations: (1) when they have property in the State, or (2) when the cause of action arose therein, or (3) when the plaintiff resides in the State. And then a fourth method is established, (4) when service can be made within this State personally on the president, treasurer, or secretary thereof."

This construction has been held also in *McDonald v. McArthur,* 154 N. C., 122; *Higgs v. Sperry,* 139 N. C., 299; *Greenleaf v. Bank,* 133 N. C., 292; *Jester v. Steam Packet Co.,* 131 N. C., 54; *Clinard v. White,* 129 N. C., 250; *Jones v. Insurance Co.,* 88 N. C., 499. The plaintiff was at the time of his injury and before and since a citizen and resident of North Carolina, and relying upon the above decisions brought his action in this State. Should he now begin an action in Virginia he would probably be barred by the statute of limitations.

The Court, in *Cunningham v. Express Co.,* 67 N. C., 426, thus construed this last clause of the section: "The several cases respecting the

foreign corporations, it will be observed, are put disjunctively, and we think that the meaning is that in either of the three cases service may be made by delivery of a copy of the summons to one of the officers named in the first clause of the section, among which is the managing agent." At that time the word "director" was not in the section, but it has been added since. It is only when neither of these three conditions exist that the service is required to be made "upon the president, secretary, or treasurer thereof."

The defendant relies upon two cases in the U. S. Supreme Court, *Goldey v. Morning News,* 156 U. S., 518, and *Conley v. Mathieson Alkali Works,* 190 U. S., 406. In the first case it was held that in an action against a corporation neither incorporated nor doing business within a State and which has no agent or property therein, service of summons upon its president, *temporarily within the jurisdiction,* cannot be recognized as valid by the courts of any other government. This does not affect the present case, as the director upon whom service was (167) made was resident here. The other case relied on holds: "Service in New York of summons upon a director of a foreign corporation who *resides* in New York is not sufficient to bring the corporation into court where, at the time of service, the corporation was not doing business in the State of New York." This case gives no reason beyond saying: "The principle announced in *Goldey v. Morning News* covers the case at bar." This it did not do. This last case, however, cites with approval the following from *Goldey v. Morning News:* "Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." Under our decisions above quoted, and upon which the plaintiff relied in bringing his action, the service is sufficient for a valid judgment, at least within our jurisdiction. What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration.

The other assignment of error is that while the Maryland Casualty Company was a party (the court having found that it was a necessary party defendant), the court allowed the reading of the plaintiff's amended complaint charging that company with liability to him, and subsequently, on motion of the defendant, dismissed the action as to said casualty company under the ruling in *Clark v. Bonsal,* 157 N. C., 270. In that case the plaintiff had attached the contract of insurance to his complaint. This case is on all-fours with *Wood v. Kincaid,* 144 N. C., 393, in which the contract was not set out as an exhibit to the complaint and it could not be ascertained by the court till the plaintiff's evidence was in that it had no cause of action against the Maryland Casualty

Company. Then the action was dismissed as to the said casualty company upon motion of the defendant. It did not appear upon the face of the complaint that the casualty company was not a necessary party, and this could not be ascertained until the evidence of the plaintiff was in. Besides, it does not appear how reading to the court allegations in the complaint against another party, as to whom the nonsuit was afterwards taken, can have prejudiced this defendant. Even if read in the hearing of the jury, the complaint was read to the court only, and
(168) if the jury paid any attention to it at all, they knew that it was not evidence, but merely the allegations of the plaintiff.

No error.

WALKER, J., dissenting: This is an action for damages for personal injuries. The defendant entered a special appearance and moved to strike out the return of the service of the summons and dismiss the action, for the reason that "the defendant is a foreign corporation, not doing business in North Carolina and not domesticated, and has no agent upon whom service can be made, and the service is invalid and does not amount to due process of law." The motion was overruled, and the defendant excepted. The defendant then answered, and the cause was tried upon its merits. From the verdict and judgment the defendant appealed.

The court found as a fact that "the defendant is a Virginia corporation and did not have at the commencement of this action, and has not now, any office or place of business in this State, and has never engaged in business here; that it has never had a process agent in this State nor been domesticated here; that T. B. Fitzgerald, upon whom the summons was served, is a director of the defendant company and is a resident of this State, but he was not at the time of the service nor at any time prior thereto transacting the business of the company and held no office therein other than that of director, and that the defendant has no property in this State."

For the validity of such service the plaintiff relies upon *Cunningham v. Express Co.*, 67 N. C., 426, and several cases decided since, which, he says, sustain that contention. But in *Conley v. Mathieson Alkali Works*, 190 U. S., it was held that: "Service in New York of a summons upon a director of a foreign corporation who resides in New York is not sufficient to bring the corporation into court where, at the time of service, the corporation was not doing business in the State of New York."

We may add to the case just cited, which seems to be a conclusive authority, the following, which are just as much in point: *Mutual Life Association v. McDonough*, 204 U. S., 8; *Kendall v. Automatic*
(169) *Loom Co.*, 198 U. S., 477; *Goldey v. Morning News* (*Gray, J.*),

156 U. S., 518; *Conley v. Alkali Works,* 190 U. S., 406; *Barrow St. Co. v. Kane,* 170 U. S., 100; *Ins. Co. v. Sprattley* (*Peckham, J.*), 172 U. S., 602; *St. Clair v. Cox,* 106 U. S., 350; *Construction Co. v. Fitzgerald,* 137 U. S., 98; *Steamship Co. v. Kane,* 170 U. S., 100; *Eldred v. Car Co.,* 103 Fed., 209.

In deference to these decisions of the highest court, we should hold and adjudge that the action be dismissed, as the cases are, at least substantially, alike in their facts.

Except in this State, the cases where it has been held that the service upon an officer of a nonresident corporation in a State other than that of its residence is sufficient, it appeared that he was transacting business of the corporation or there was some other fact or circumstance which implied authority to receive service. It would seem to be at least fair and just that the officer upon whom service is made should be under some legal duty to make known the fact of service to the corporation, and not merely under a moral obligation to do so, or by charging him with the transaction of business in the State of service the corporation should thereby have made him, at least impliedly, its representative in that State, under its laws, whose protection it has enjoyed, and thereby subjected itself to binding service upon him.

BROWN, J., concurs in this dissent.

Reversed on writ of error. 237 U. S., 189.

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(170)

TERISA E. PAGE v. JOSEPH B. PAGE.

(Filed 11 December, 1912.)

1. Marriage and Divorce—Misconduct of Plaintiff.

When the misconduct of the complaining party in an action for divorce *a mensa et thoro* was calculated to and reasonably did induce the conduct of defendant, relied upon in the action, he or she, as the case may be, cannot take advantage of his or her own wrong, and the decree of divorcement will not be granted.

2. Same—Alimony Pendente Lite—Main Relief—Questions for Jury—Practice—Appeal and Error.

When in an action for a divorce *a mensa et thoro* brought by the wife a motion for alimony *pendente lite* is made, and it appears that she herself is in fault, and that her own misconduct brought about the results complained of, the motion for alimony should not be granted, leaving the issues on the main relief sought for the determination of the jury at the

trial; and it appearing in this case that the defendant had placed the children of the marriage with his parents for their benefit, and that the lower court had ordered that the plaintiff should see them at certain intervals, the decree is affirmed in that respect, and reversed as to the allowance of attorney's fees and alimony *pendente lite.*

APPEAL by defendants from *Foushee, J.*, at April Term, 1912, of POLK.

This is an action for divorce *a mensa et thoro,* and was before the court below at the last term, on a motion for alimony *pendente lite,* which was heard upon the complaint and answer, read as affidavits, and also upon oral testimony taken before the court. The judge announced that in considering the matter he would accept the defendant's testimony as true, and we will so treat it in this Court. Before the taking of testimony had closed, the defendant's counsel stated that he had a number of witnesses present in court, by whom he proposed to prove that the plaintiff was cross, disagreeable, and erratic, and that she had often left home without cause or provocation on his part, and that she was so irritable, disagreeable, and erratic as to keep his children continually in a state of consternation and fear, to all of which the defendant had testified. The judge refused to hear this evidence, on the ground (171) that it only corroborated the defendant and that it could not change his opinion, and that because of the crowded condition of the docket he had no time to hear it. The judge found the following facts:

1. That the plaintiff and defendant were married 18 July, 1895, and lived together until the month of June, 1911; that the plaintiff is 38 years of age, and the defendant 45; that they have two children, Paul and Eva, aged 12 and 4 years.

2. That the plaintiff is a weak, delicate woman, nervous and hysterical; that she has never been strong; and in September, 1910, went to the hospital for treatment; that several doctors prescribed for her during her married life, and one of them told defendant that if something were not done for her that she might lose her mind; that another physician cautioned her husband that she must not be permitted to do any hard labor, and he must not let her lift even the weight of a coffee-pot; that the defendant did not provide her with a cook or laundress all the time, and she had to do some of the cooking and some of the washing; that plaintiff and defendant were members of the Baptist Church, having been reared therein, but about five years ago the plaintiff joined the Holiness Church, and since that time there has been friction between plaintiff and defendant, the latter not being willing for his children to go to the Holiness Church; that plaintiff's moral character is good.

3. That defendant is a hard-working, industrious man, engaged in farming, and worth from $8,000 to $10,000; that he has always lived close and has accumulated property; that defendant thought his wife was obstinate and unreasonable; that in June, 1911, the defendant took his two children from his and plaintiff's home to the home of his parents at Tryon, four or five miles distant, and left them there, and since that time has declined and refused to permit plaintiff to see them; that plaintiff has tried four times to see the children, and on her last visit defendant's parents ordered her away and threatened to have her arrested by the town policeman; that a few Sundays before he took his children to his father's plaintiff was preparing to go to her own church and had gotten the little girl dressed and ready to go, when defendant forbade her taking the little girl with her and forcibly prevented her from going with her mother; that defendant did not provide any buggy for the plaintiff to ride in to church, but left her to ride (172) on a loaded wagon or walk, as she felt inclined; that defendant gave as his excuse that he had to use the buggy himself, and his wagon had to go to Landrum, where the plaintiff's church was situate.

4. That while the court does not believe that the defandant was intentionally unkind and cruel, yet his wife's condition was such that the result of his treatment was to render her life burdensome and her condition intolerable.

It is, therefore, ordered that the defendant pay to the plaintiff the sum of $50, as as allowance for counsel fees, the same to be paid within sixty days; also that he pay $25 per month, as alimony *pendente lite*, to begin with 1 May, and to continue until the further order of this court. It is further ordered that plaintiff be permitted to see her children on the second Sunday of each month between the hours of 9 A. M. and 5 P. M.

Defendant excepted to this order and appealed.

S. Gallert for plaintiff.

Smith, Shipman & Justice for defendant.

WALKER, J., after stating the case: The facts found by the court bear a very different aspect when read in connection with the testimony of the defendant. The court has acquitted the defendant of any intended wrong, and when all of the facts are considered, he was guilty of no wrong at all. The true significance of the facts, as found by the court, does not appear until we have heard all of the defendant's version, which we are to consider as true, according to the ruling of the court. The parties had lived together as man and wife for many years, and they had two children of their marriage, whose tender years required that they should receive careful nurture and admonition, and this, it seems,

they did not get from their mother. We are to understand that she was "irritable, disagreeable, and erratic, and kept her children continually in a state of fear and consternation," for the defendant so testified, the judge has said. And to more did he testify. It appears, from what he said of this unfortunate domestic tragedy, that the plaintiff is of a testy disposition, "cross and ill-tempered," and exceedingly sensitive and exacting. We would not be willing to call her a virago or
(173) a termagant, even if the testimony shows that she was unruly and somewhat turbulent at times, for that would be harsh and unseemly, if not uncharitable, but prefer to use kind and gentle words, though her husband's evidence, which we are to take as true, is strongly against her and does not present her to the Court in a very favorable light. There is nothing in the case to impeach the moral character or integrity of either one of the parties. The whole difficulty seems to have sprung from the wife's infirmity of temper, and we are not at all surprised that the court would not impute any intentional wrong-doing to the defendant. The three allegations of wrong are that she was weak and was required to work contrary to the advice of her physician; that she joined the Holiness Church and defendant would not permit the children to attend the church, which caused friction between them, and that he would not provide her with a buggy in which to ride to her church, and she was compelled to ride on a wagon, and lastly, that defendant took the children from her and placed them in his old home under his mother's care and guardianship.

The defendant, in his testimony, gives a circumstantial account of this family dispute, and it appears therefrom that the plaintiff was physically strong and able-bodied, and performed her household duties without complaint and without any apparent injury to herself. Her husband employed cooks, but she interfered with them and drove them off. He says that he never mistreated her, never drove her away or ordered her to go, though she had ordered him to leave home. She did just as she pleased,and insisted on doing it. She struck him with the dishrag when he was doing no more harm than looking after the tax-books. She was always contrary and always opposed anything he wished to do. The little boy wanted to hoe for him, and she objected and became very mad. She refused to cook, interfered with the women employed to cook, and made them leave, and defendant had to cook, and when he did, she would cook afterwards. She interfered with the washerwomen. He walked to Mill Springs to hire a hand, when there were others nearer who could have been employed, but she was not satisfied. He said
(179) something about darkies she had hired, and she jerked his hat off his head and called him a "stinking, lowdown rascal." He

then went out to see about the horses, and she followed him, and finally locked the door of the house, so that he could not enter, and he got in through a window and slept in a front room. This was repeated the next day. He called in every doctor in the county when she was sick, and had to change them several times to please her. She went to the hospital with his consent and at his expense. She would vilify his mother and preach a while—preached all day long to his aunt; and she would preach and then abuse him, saying that he was doomed to hell. These are only some of the things that were said and done. It is not necessary to detail all of them. He testified that he had never provoked this conduct towards him, and always provided a way for her to attend church and had always been kind to her. Her spells were worse sometimes than they were at others. One of the doctors said there was something wrong with her mind, and others that she was nervous.

Our conclusion is, from all the facts, that the plaintiff has shown no grounds for a divorce from bed and board, and consequently no right to alimony pending the suit. Upon the facts, as we view them, the defendant was not at fault in placing his children in the custody of his parents, where they could receive a mother's care and attention. It is shown that they were placed there for that purpose. We see no sufficient proof of physical weakness, though there is some tending to show mental weakness or an abnormal condition of her mind. It seems that if defendant has laid his hand upon her, it was more in kindness than in anger. He supplied her every want. It is evident that she was nervous and sensitive, and magnified and exaggerated everything he did. The separation is due more to her misconduct than to aything that he may have done. He appears to have been very patient and forbearing, under trying circumstances. She received proper medical attention and he employed servants sufficient in number to do their work, if she had not interfered with them.

If the cruelty set up as a ground of divorce was provoked by (175) the misconduct of the complainant, a divorce will not be granted. 14 Cyc., 631. If his conduct had been such as to entitle her to a divorce, but was induced by the continued exasperation and violence of the wife, or other misconduct on her part, the same result would follow. There was no retaliation by the husband in this case, and certainly no excessive retaliation. Their domestic infelicity is apparently all due to the wife's misconduct. It is settled by our decisions that, where the wife is the aggressor and by her conduct provoked that of her husband, of which she complains, and it was calculated to do so, it is a bar to her application for a divorce and for alimony. *Whittington v. Whittington*. 19 N. C., 64; *Foy v. Foy*, 35 N. C., 90; *Setzer v. Setzer*, 128 N. C., 170;

Tew v. Tew, 80 N. C., 316; *House v. House*, 131 N. C., 140. No one will be allowed to take advantage of his or her own wrong. This maxim was applied to a case of divorce by *Judge Pearson* in *Foy v. Foy, supra.* In the words of the statute, Code, sec. 1285, Revisal, sec. 1562, the application for the divorce must be made "by the party injured," and these words were construed in *Steel v. Steel*, 104 N. C., 631, to mean that neither of the spouses is entitled to divorce if his or her marital default provoked or induced the alleged misconduct of the other.

If the plaintiff will exercise a little more self-control and forbearance and perform her household duties as becomes a dutiful wife, and exhibit a little more consideration for her husband, and real affection for him and her children, the present distressing situation will soon be changed, if not reversed, and her home and her life will become brighter and happier.

We may reproduce here what was so well said by *Justice Rodman* in the somewhat similar case of *Miller v. Miller*, 78 N. C., at p. 108: "We cannot think the defendant's conduct, however reprehensible, was 'such indignities' as was intended to be covered by the statute, or was calculated to render the condition of any reasonable woman 'intolerable or her life burdensome.' This is not a case in which the law ought to interfere to sanction and, perhaps, perpetrate the separation of a married pair who may again unite without impropriety, and with-
(176) out the loss of self respect on the part of either, and who, taught by experience, may live henceforth happily together. An English poet once gave advice to husbands, which Lord Chatham made immortal, even if its own good sense had not otherwise served to make it so, by quoting it in one of his great speeches on the policy of Britain towards America. The advice will equally teach wives how to manage their husbands:

> "'Be to his faults a little blind,
> Be to his virtues very kind,
> And clap your padlock on his mind!'"

It is not intended to imply by the quotation that defendant has been doing anything which the law would denominate as misconduct. But whether he has or not, the advice to the wife is not out of place.

We do not concur with the court in its conclusion that, assuming the defendant's testimony to be true, the plaintiff is entitled to alimony. On the contrary, it appears therefrom that there was no cruel or barbarous treatment and nothing whatever calculated to make the condition or life of an ordinary and normal woman either intolerable or burdensome. The defendant made the best he could of a bad situation, when

his patience and forbearance must have been sorely tried. Both parties will profit by remembering that, "Our remedies oft in ourselves do lie."

The order granting alimony will be vacated and the order permitting the plaintiff to see her children at the intervals named will remain in force. It may be modified, if need be, in the discretion of the court from time to time, and as the exigencies of the case may require. *Setzer v. Setzer,* 129 N. C., 296.

Our decision does not prevent a trial of the issues. The plaintiff hereafter may allege and establish a better case than she has in the present record, and one entitling her to a divorce, but there is no such case now presented.

Error.

Cited: *S. c.,* 166 N. C., 90; *S. c.,* 167 N. C., 347; *Garsed v. Garsed,* 170 N. C., 673.

(177)

FILMORE HOLDER v. GIANT LUMBER COMPANY.

(Filed 20 November, 1912.)

1. **Evidence—Nonsuit—Instructions—Appeal and Error—Practice.**

The question of the sufficiency of the evidence to submit the case to the jury can only be considered on appeal by an exception to the refusal of the trial court to grant a motion of nonsuit or to give a proper prayer for instruction to that effect.

2. **Instructions—Time of Filing—Court's Discretion—Appeal and Error.**

When it appears that the trial judge has refused to accept prayers for special instructions tendered him after the commencement of the argument, and no permission to file them at that time appears to have been given, his refusal to consider the special requests is within his reasonable discretion, and his action will not be reviewed on appeal. *Craddock v. Barnes,* 142 N. C., 89, cited and approved.

3. **Witnesses, Expert—Hypothetical Questions—Questions for Jury—Appeal and Error.**

Hypothetical questions asked of an expert witness, a physician, in this case, as to the effect of the wound upon the plaintiff's knee alleged to have been negligently inflicted by the defendant, and the cause of the suffering alleged to have ben thereby endured, are held to be proper, and not trespassing upon the province of the jury.

4. **Instructions—Master and Servant—Duty of Master—Safe Tools and Appliances.**

Instructions in this case relating to the duty of the master to furnish his servant proper tools and appliances with which to do his work, are sustained, and *Mercer v. R. R.,* 154 N. C., 400, cited and applied.

APPEAL by defendant from *Lyon, J.*, at August Term, 1912, of WILKES.

Civil action. The following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his own injury? Answer: No.

3. What damage is the plaintiff entitled to recover? Answer: $800.

From the judgment rendered, the defendant appeals.

(178) The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE BROWN.

Hackett & Gilreath for plaintiff.

W. W. Barber and Finley & Hendren for defendant.

BROWN, J. The principal question discussed on the argument of this case by the learned counsel for the defendant is not presented in such a manner that we can consider it. As to whether there is sufficient evidence of negligence to justify the submission of the question to the jury can only be presented by a motion to nonsuit, or by a proper prayer for instruction.

No motion to nonsuit appears to have been made, and we are debarred from considering the prayers for instruction because of the objection of the plaintiff that they were not filed within the time required by the statute.

After the argument commences it is well settled that counsel will not be permitted to file requests for special instructions without leave of the court, and no such leave appears to have been given in this case, for the court declined to consider the prayers after they were handed up.

In *Cradddock v. Barnes* it is said the time within which special instructions should be requested must be left to the sound discretion of the presiding judge, and this Court will be slow to review the exercise of such discretion; but the judge must so order his discretion as to afford the counsel a reasonable time to prepare and present their prayers. 142 N. C., 89; *Biggs v. Gurganus*, 152 N. C., 176.

The assignments of error relating to the hypothetical questions asked Dr. Duncan, we think, are without merit. It is unnecessary to set out the questions themselves. The opinion asked of the witness did not trespass at all upon the province of the jury. These questions only elicited from the physician his opinion of the effect of the wound upon the knee, and also his opinion upon the cause of the suffering alleged to have been endured by the plaintiff. We think the hypothetical

questions were framed correctly, according to the rule laid down in *Summerlin v. R. R.*, 133 N. C., 551.

We do not think the assignments of error relating to the charge (179) of the court can be sustained. His Honor seems to have followed the well settled decisions of this Court relating to the duty of the master to furnish proper tools and appliances to his servant. *Mercer v. R. R.*, 154 N. C., 400, and cases cited.

Upon a review of the entire record, we find

No error.

Cited: *S. v. Claudius*, 164 N. C., 526.

WARD, ADMINISTRATRIX, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 4 December, 1912.)

1. Nonsuit—Negligence—Evidence—Questions for Jury—Proximate Cause.

Upon a motion to nonsuit, the evidence of the plaintiff must be taken as true and construed in the light most favorable to him; and in an action to recover damages against a railroad company for the negligent killing of plaintiff's intestate, there was evidence tending to show that the intestate, with five others, were engaged in loading imposing stones on defendant's box car, from a wagon, each 6 or 7 feet long, 3½ feet wide, 4 inches thick, and weighing about 1,000 pounds each; that one of these stones had been placed in the car, several inches projecting from the door, and to further load this, four of the men were in the car, leaving the intestate and the driver of the wagon holding to the other stone, placed upright upon the wagon to keep it from breaking, until the stone on the car could be put in place; that while in this dangerous position, without help to brace the stone or hold the horses, it being all the intestate and driver could do to hold the stone upright, the engineer of the defendant, in shifting cars, carried the one in question off without warning with the four men in it, with full knowledge of the intestate's danger, keeping it for fifteen minutes, and when the car returned, the jarring of the ground caused by the moving train or the movement of the horses, caused the upright stone to be thrown on the intestate, causing his death: *Held*, the issue as to defendant's negligence was for the jury, and the doctrine of proximate cause, in *Harton v. Telephone Co.*, 141 N. C., 455, and other like cases, cited and approved.

2. Negligence—Proximate Cause—Definition.

The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is not part of the definition.

3. Negligence—Proximate Cause—Anticipated Result—Evidence.

In order to show that the proximate cause of an injury was the negligent act complained of, it is not required that the party charged should have contemplated or even been able to anticipate the particular consequence that ensued, or the precise injuries sustained. It is sufficient if in the exercise of reasonable care he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

4. Instructions—Correlative Positions—Evidence—Appeal and Error.

Held, under the evidence in this case, there is no error in the manner of stating the position of the plaintiff, and the correlative position tending to sustain the defense.

5. Negligence—Evidence—Mortuary Tables—Measure of Damages—Instructions.

In an action to recover for the negligent killing of another, the life expectancy tables are allowed as an item of evidence on the issue of damages, under the rule laid down in *Mendenhall v. R. R.*, 123 N. C., 275, to ascertain their admeasurement, by finding the present value of the net pecuniary worth of the deceased, ascertained by deducting the cost of his own lpiving and expenditures from the gross income, based upon his life expectancy; the rule laid down in *Watson v. R. R.*, 133 N. C., 190, is not approved.

APPEAL by defendant from *Cooke, J.*, at June Term, 1912, of (180) GUILFORD.

The action was instituted by plaintiff, administratrix of James Ward, deceased, to recover damages for the alleged negligent killing of her intestate in the city of High Point on 22 October, 1909, while loading a printing outfit into one of the cars on the team track of the defendant company. On the ordinary issues in such action, as to negligence, contributory negligence, and damages, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

W. P. Bynum and R. C. Strudwick for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J. It was chiefly urged for error that the court re- (181) fused defendant's motion for nonsuit under the statute.

There was evidence on the part of the plaintiff tending to show that on 22 October, 1909, plaintiff's intestate and five others, including the driver of the team, were engaged in loading a printing outfit into a car of defendant company placed upon the "team track" near the freight station in the city of High Point, and for that purpose the wagon had been backed up against the car, that particular load consisting of two large "imposing stones," stone slabs 6 to 7

feet long, 3½ feet wide and 4 inches thick and weighing by estimate of the driver about 1,000 pounds each. That the stones, each in a separate crate standing on edge in the midst of the wagon, had been braced on either side against the wagon standards as they were being hauled to the station, and when the wagon was backed against the car, these braces, preparatory to unloading, had been knocked loose and one of the stones had been transferred to the car. This stone having failed to get entirely in the car, "sticking out a few inches," in the language of the witness, four of the men were engaged in trying to push it further in, and plaintiff's intestate, James Ward, and the driver balancing the other stone in the wagon till this could be done. While things were in this condition the agents of defendant company, without warning of any kind, hitched a shifting engine to the car and pulled this, with other cars attached to it, for some distance up the track, carrying away the four men who were working with the stone in the car, leaving the intestate and the driver holding the other stone at a balance in the wagon. The car and the men in it were kept away about fifteen minutes doing some shifting elsewhere on the yard, when they brought back the car to its original placing. When the car moved off, leaving the driver, one J. A. Cramer, and the intestate, holding the other stone in a balance, the team, at the call of the driver, moved forward a few feet with a view of preventing a possible collision in case their horses should otherwise move the wagon towards the track, and the driver and the intestate continued to hold the stone till the return of the train, when either from the jar of the ground caused by the returning train or from a slight movement of the horses, the stone in the wagon, losing its (182) balance, fell off the wagon onto the intestate, crushing him so that he died in about thirty minutes. The driver was also knocked from the wagon and bruised on the wrist, etc., but fell on the stone and not under it, and escaped with slight injury. Speaking directly to the killing, the driver, testifying for plaintiff, said: "The horse may have turned his head to look, and moved the wagon. It only takes very little on a macadam road to move a wagon; something moved the wagon I am unable to say what, but something moved it, and we lost our balance and that stone, it went over against Mr. Ward; he was pushed back against the side plank of the bed and tossed out. It tripped him; in stepping back against the bed it overbalanced and tripped him out; he went out and the stone after him. The stone fell right toward Mr. Ward and the top went down and the bottom edge came up there; the plank struck me on the shins and tripped me, barked my shins a little and my wrist. Throwed me out over the stone and Ward under it. It came down there, the edge right across his breast. It mashed him;

he never spoke." This witness further said the car had been placed there and they had been loading in it all day. This witness testified further that the stones broke very easily and were kept on edge to keep them from breaking in the travel by a jar of the wagon; that they could not rebrace this one after the car left, as it took all they could do to hold it on the balance; in order to brace it additional help was necessary, and they didn't think bracing would be required if the car had not been moved away. When the car was pulled away some of the men called to "Look out or somebody would be killed"; and further, that the conductor knew of the plight in which the intestate and driver had been left with the stone and was aware that the position was one not free from danger; the driver testifying among other things on this point: "We didn't ask the conductor when he came there for any assistance, only I told him we were in a pitiful way there and had the stone to hold. I spoke something in regard to the stone; I could not remember just the words. He saw it; it was all clear to him; we had it (183) holding it on there, and he said: 'I will have the car back in a few minutes,' and put right off up the track after the car." There was evidence on the part of defendant in contradiction of the claim of plaintiff that the officers of the road were aware of the intestate being left in a dangerous plight, and whether the train gave the proper signals for shifting, etc., in going off and returning, and the yard conductor testified that he noticed Cramer, the driver, that he was about to signal the car forward; but there was no substantial difference in the testimony as to the controlling facts relevant to the injury; that the agents of the company, admitting they knew these persons were engaged in loading a car on the "team track," moved it away without adequate warning to the driver and without any at all to the men who were engaged in the car; that they kept it away for fifteen or twenty minutes, leaving the intestate and the driver all that time engaged in holding a heavy stone on end in a way which liable at any time to fall and hurt them; and the testimony on the part of plaintiff tended to show that the company's agents were duly aware of their plight, and in such case and in view of the position so frequently stated, that on motion to nonsuit, the evidence of plaintiff must be taken as true and construed in the light most favorable to him, we are of opinion that the motion for nonsuit was properly overruled and a cause of action clearly shown. It was earnestly contended in support of the motion that the element of proximate cause was lacking in this instance, in that there was nothing to indicate to the company or its agents that fifteen minutes after taking the car away any such result as the killing of the intestate was at all probable, and that in view of the fact that the shifting was done in the usual and ordinary way, giving the usual and ordinary signals, and

with two men in the wagon to hold the stone steady, that this should be held only an untoward accident, and that no actionable wrong had been shown. But we cannot accept this view of the facts in evidence. In *Harton v. Telephone Co.*, 141 N. C., 455, a case in which the question of proximate cause, more especially in reference to lapse of time and the effect of intervening causes, was very fully discussed, the Court stated with approval the definition appearing in Shearman and Redfield on Negligence, sec. 26, as follows: "The proximate cause of an event must be understood to be that which in natural (184) and continuous sequence, unbroken by any new and independent cause, produces that event and without which such event would not have occurred. Proximately in point of time and space, however, is no part of the definition." As said by *Associate Justice Allen* in *Harvell v. Lumber Co.*, 154 N. C., 262, while two of the justices dissented in *Harton's case* (their views finally prevailing on a second appeal and a fuller statement of the facts in same case, 146 N. C., 429), there was no difference of opinion as to the doctrine announced, but only to the application of it to that case. And this same definition of proximate cause has been again approved in *Hardy v. Hines Lumber Co.*, 160 N. C., 113. In further illustration of this definition, and more particularly the terms, "natural and continuous sequence," in *Brewster v. Elizabeth City*, 137 N. C., 392, and *Ramsbottom v. R. R.*, 138 N. C., 39, and other cases, this Court has said, "That the proximate cause of an injury is one that produces the result in continuous sequence and without which it would not occur, and one from which any man of ordinary prudence could forsee that such result was probable under all of the facts as they existed." And pursuing the subject, it has been held in *Drum v. Miller*, 135 N. C., 204, and *Hudson v. R. R.*, 142 N. C., 198, and other like cases, that in reference to foreseeing the result, it is not required that the party charged "should have contemplated or even been able to anticipate the particular consequences that ensued or the precise injuries sustained. It is sufficient if in the exercise of reasonable care he might have foreseen that *some* injury would result from his act or omission or that consequences of a generally injurious nature might have been expected." Applying these principles to the facts in evidence, we think that the element of proximate cause was clearly established, and certainly there was testimony from which it could be reasonably inferred. The car being moved away without adequate warning, carrying four of the men considered necessary for the proper handling of the load, leaving the driver and the intestate with a stone of this shape and weight on end, requiring all their time and attention to hold it on a balance and with no one to aid him or even control the team, presented

a condition that was fraught with danger, and the yard conductor,
(185) on seeing it, might well exclaim, "I will have the car back in a few minutes," and put right off up the track after the car. Nor is this conclusion in any way affected by the fact referred to, that the injury occurred as much as fifteen or twenty minutes after the car was pulled away, or that there were only two men in the wagon when it was so moved. The cause of this tragedy was taking away the other men, leaving the intestate and the driver in the wagon in a position threatening danger, without adequate help. This cause continued down to the very time of the occurence. There was no intervening cause shown, and as we have just seen in *Harton's case*, "Proximity in point of time and space is no part of the definition of proximate cause."

As to the position that there were only two men in the wagon at the time the cars were moved off, it will readily occur to the impartial mind that leaving two men in a wagon with a heavy stone of this character and the team without any one to control it for fifteen or twenty minutes is an entirely different proposition from allowing them to balance a stone momentarily with four other men in instant call should necessity arise for their aid.

The objection further made, that the court, after stating the position of the plaintiff, failed to state with sufficient fullness the correlative position tending to sustain the defense as required in *Jarrett v. Trunk Co.*, 144 N. C., 299, and *Penny v. R. R.*, 153 N. C., 305, is not, in our opinion, open to defendant on the record.

There were very few facts in evidence tending to excuse the defendant for this occurrence, and these were given by his Honor all the consideration which they permitted.

On the issue as to damages objection was made by defendant for that his Honor suggested for the guidance of the jury the mathematical calculation stated with approval in *Watson v. R. R.*, 133 N. C., 190, and in terms as follows: "You will ascertain the present value of such
(186) net income or accumulations by first ascertaining what $1 and interest at 6 per cent will amount to for the time you have found the plaintiff's intestate would have lived. Then you will divide this income by the amount you have found $1 and interest for the time to amount to, and the sum thus ascertained will be your answer to the second issue."

If this were a matter capable of being established with mathametical accuracy, the rule as here suggested would be erroneous, for it proceeds upon the theory that all the net earnings will become due at the end of the expectancy, when in fact the total amount is made up of smaller sums accruing year by year. A proper consideration of the question

presented, however, supports the conclusion that there are so many elements of uncertainty involved, the result is or may be affected by so many changes of condition and circumstance that it does not seem to be capable of computation with mathematical precision, and a reference to such a method is rather calculated to mislead than to aid the jury to a correct conclusion. It is for this reason that the Court in *Poe v. R. R.*, 141 N. C., 525, rejected the application of our annuity tables on the issue as to damages, and *Associate Justice Walker*, delivering the opinion, said: "A review of all that has been said on this subject leads us to the conclusion that no special formula has yet been prescribed as alike applicable to all cases and as one that should invariably be used in trials."

He then states with approval on this question the charge as delivered by his Honor, *Judge O. H. Allen*, in *Mendenhall v. R. R.*, 123 N. C., 275 and 278, as being a correct statement of the rule more generally applicable in these cases: "The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary (187) worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, reasonable, pecuniary worth of the deceased to his family under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy; it is just a plain practical question, and you should give a reasonable and fair verdict upon all the issues." The life expectancy tables were allowed as an item of evidence on this issue. *Sledge v. R. R.*, 140 N. C., 459.

The objection referred to is not insisted on in defendant's brief, and the mistake in the charge being in his favor, it may not be held for reversible error, but it has been thought well to refer to the matter that this mathematical calculation as approved in *Watson v. R. R.*, 133 N. C., 190, should be discontinued.

There is no error, and the judgment in plaintiff's favor must be affirmed.

No error.

Cited: *Lynch v. Mfg. Co.*, 167 N. C., 102; *Ingle v. R. R.*, *ib.*, 637; *Massey v. R. R.*, 169 N. C., 246; *Paul v. R. R.*, 170 N. C., 233; *Davis v. R. R.*, *ib.*, 584, 587; *Horne v. R. R.*, *ib.*, 656.

W. L. COREY v. S. R. FOWLE AND W. C. RODMAN.

(Filed 20 December, 1912.)

1. **Legal Proceedings — Presumptions — Sales — Deeds and Conveyances — Homestead — Excess — Debts Contracted Prior to 1868 — Constitutional Law.**

The presumption is in favor of the validity of judicial proceedings, and where a tract of land has been sold under a judgment on a debt contracted prior to the Constitution of 1868, and the homestead has since been laid off in a part thereof, in the absence of evidence to the contrary it will be presumed that the excess was first sold, and the proceeds being insufficient to pay the debt, the homestead was then sold, and the deed of the sheriff conveying the entire tract will be held valid.

2. **Limitation of Actions—Adverse Possession—Color.**

Held, in this case, involving title to lands in dispute, the charge was correct that though the title passed to the defendant by his deed, the plaintiff could recover by showing title by adverse possession, not under color for twenty years, and under color for seven years.

BROWN, J., did not sit on the hearing of this appeal.

(188) APPEAL by plaintiff from *Webb, J.*, at May Term, 1912, of BEAUFORT.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

T. J. Jarvis, F. C. Harding, B. B. Nicholson, E. A. Daniel, and O. A. Gaylord for plaintiff.

Rodman & Rodman, Small, MacLean & McMullan, and Ward & Grimes for defendant.

CLARK, C. J. The land in question was sold 3 November, 1870, under executions against H. D. Ecklin and the sheriff executed a deed therefor to Joshua B. Hill, which deed was recorded 7 March, 1871, and the defendants claim thereunder through mesne conveyances. The same land was sold again under execution against H. D. Ecklin and the deed was executed 3 June, 1878, to the purchaser, G. H. Brown, and recorded 20 May, 1895. The plaintiffs claim through mesne conveyances under this deed.

On 12 March, 1869, Ecklin by proceedings before a justice of the

peace had his homestead laid off of 590 acres and recorded, but in the deed from the sheriff to Hill, recorded 7 March, 1871, there is no reservation of this exemption, but the entire tract of 690 acres is conveyed, including the 590 acres which had been laid off to Ecklin as his homestead. Under the decision in *Edwards v. Kearsey,* 96 U. S., 595, October Term, 1887, it was held that the homestead exemption was invalid as to debts contracted prior to the Constitution of 1868. The judgments upon which executions issued under which this land had been sold and conveyed to Hill were for debts contracted prior to 1868. The land was sold under similar executions in 1878. The judgments being dormant, the defendant therein, Ecklin, indorsed on the back, "This (189) judgment has not been satisfied."

At this last sale in 1878 the property was bought in for the benefit of the children of Ecklin and afterwards conveyed by the purchaser at their instance to Corey, under whom the present plaintiff claims. The idea seems to have been that which was afterwards laid down in *Mebane v. Layton,* 89 N. C., 397, that notwithstanding the executions were for the collection of debts contracted prior to the Constitution of 1868, that the homestead should have been laid off first, and after that, if not sufficient to pay the debt, the excess should have been sold, and that if the homestead was not laid off the sale was invalid. The homestead in this case was laid off as we have seen, and it does not appear in the record that the excess was not first sold. The entire tract of land belonging to Ecklin was conveyed to Hill, and the purchase price was less for the entire tract than the face of the executions, which fact appears both from the purchase price recited in the deed and also from the fact that the land was subsequently sold in 1878 under executions on judgments upon debts contracted before 1868, upon which the indorsement of Ecklin recited, "This has not been satisfied." In the absence of evidence, the presumption is in favor of the regularity of judicial proceedings, and that the excess was first sold and then the homestead. There is nothing in the record to rebut this presumption. Unless it appears that the sale of the excess would have paid the debt, the deed for the entire tract is valid. *Miller v. Miller,* 89 N. C., 402, and other cases cited in *Morrison v. Watson,* 101 N. C., at page 337.

The decisions that sales under executions issued on debts antedating the Constitution are invalid unless the homestead was allotted (*Mebane v. Layton,* 89 N. C., 397, and the like) do not apply, because here the homestead had been allotted and recorded. Besides, the decisions so holding were overruled in *Long v. Walker,* 105 N. C., 90. This last case has been followed, *Shaffer v. Gaynor,* 117 N. C., 27; *Campbell v Potts,* 119 N. C., 530, and in other cases.

His Honor correctly charged the jury that the legal title passed to Hill under the prior deed, but that the plaintiff could recover if
(190) he showed that he and those under whom he claims had held the land adversely under known and visible bounds for twenty years; or that the plaintiff could recover if he showed that he and those under whom he claims have held open, notorious, continuous, and adverse possession of the land for seven years under color of title, and that the sheriff's deed to Brown was color of title. There was conflicting evidence as to the possession of the land, and this matter, which was purely one of fact, was fairly submitted to the jury. The jury found their verdict in favor of the defendants.

There are no exceptions in the record except to the charge and to the failure to give one prayer for instruction. The points presented by these exceptions have been often settled by decisions of this Court, and do not require to be repeated.

The controversy, in fact, is almost entirely one of fact, the principles of law being well settled. The evidence is very voluminous and the trial, it seems, occupied three days. On this account we have very carefully examined the record, but find no doubtful proposition of law raised by the exceptions, and the findings of fact by the jury are not reviewable by us.

No error.

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(191)

MADISON COUNTY RAILWAY CO. v. R. M. GAHAGAN ET AL.

(Filed 14 December, 1912.)

1. Railroads—Easements—Condemnation—Good Faith—Pleadings — Issues—Interpretation of Statutes.

When in proceedings by a railroad company to condemn lands the answer denies the intention of the petitioner in good faith to construct the proposed railroad (Revisal, sec. 2580), the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the Superior Court in term, under the provisions of Revisal, sec. 529; and section 2588, construed in connection with section 529, which provides only for a jury trial on appeal from the amount of damages assessed by the appraisers, excludes the idea that the question of good faith should in like manner be tried.

2. Railroads—Easements — Condemnation — Damages — Costs — Appeal and Error.

In proceedings brought by a railroad company to condemn lands, it was found by the jury on appeal to the Superior Court that defendant's benefit therefrom exceeded his damages, the assessors having found they

were equal: *Held*, the costs were taxable against the plaintiff accruing up to the time of appeal from the clerk, and against the defendants appealing from the Superior to the Supreme Court, the judgment of the Superior Court being affirmed.

3. Railroads—Easements—Condemnation—Measure of Damages—Water-powers—Harmless Error—Instructions—Appeal and Error.

In proceedings to condemn lands there was evidence tending to show that there was an undeveloped water-power thereon, which was the only evidence as to the future possible use of the property. The judge charged the jury that it was only proper for them to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property; and further, specically and correctly charged how the jury should consider the evidence on this phase of the damages: *Held*, construing the charge as a whole, no error is found, and the charge of the court is approved.

APPEAL by defendant from *Long, J.*, at February Term, 1912, of MADISON.

This is a proceeding brought by the plaintiff against the defendants for the condemnation of certain lands belonging to the defendants for a right of way for railroad purposes. The proceeding was commenced by a summons issued by the Clerk of the Superior Court of MADISON, on 28 December, 1910.

Upon the return of the summons, complaint and answer having been filed, the clerk made an order appointing commissioners to assess damages and benefits to the defendants' lands. The commissioners reported that the damages and benefits were equal. The defendants excepted to the order appointing commissioners and to the report of the commissioners, and to the order of the clerk confirming the report of the commisioners, and appealed to the Superior Court in term-time, (192) where it was tried and the jury rendered a verdict for the plaintiff, assessing the defendants' damages at $1,800 and their benefits at $3,400. Judgment was thereupon entered for the plaintiff, and the defendants appealed to the Supreme Court.

It is alleged in the petition and denied in the answer: "That it is the intention of the Madison County Railroad Company in good faith to construct and finish and operate a railroad from and to the places named for that purpose in the articles of the association, and referred to in the 11th paragraph of this petition."

In the order appointing the commissioners, the clerk finds as a fact that it is the intention of the petitioner, in good faith, to construct and operate the railroad as alleged, and it appeared on the trial in the Superior Court that the road had been constructed a distance of 10 miles, and was then in operation as a common carrier.

The defendants tendered the following issue, which was refused, and they excepted: "Is it the intention of the plaintiff, in good faith, to construct, finish, and operate the proposed railroad as a common carrier, as alleged in the petition?"

His Honor taxed the costs against the petitioner up to the time of the appeal from the clerk, and against the defendants thereafter, and defendants excepted.

Gudger & McElroy, Guy & Roberts, and Merrick & Barnard for plaintiff.

Martin, Rollins & Wright for defendants.

ALLEN, J. The denial by the defendants of the allegation in the petition that it is the intention of the petitioner in good faith to construct and operate the proposed railroad, does not raise an issue of fact, and his Honor properly refused to submit the issue tendered. *R. R. v. R. R.*, 148 N. C., 64.

In this case, the Court says: "The plaintiff, as required by section 2580, Revisal, stated in its petition that it had been duly chartered; that it was its intention in good faith to construct, finish, and operate
(193) a railroad from and to the *termini* named in its charter; that its capital stock, as required by its charter, had been subscribed and the portion thereof required to entitle its organization and commencement of operation had been paid in; that it had been unable to acquire title to the lands necessary for its right of way or the easement thereon, and the reason of such inability. . . . When these essential averments are made and denied, how shall the court (the clerk) proceed? It is manifest that the pleadings, in this condition, do not raise 'issues of fact,' requiring the cause to be transferred to the civil-issue docket, as required by section 529, Revisal. These preliminary questions are to be decided by the clerk. If he finds against the petitioner upon them, he dismisses the proceeding, and, if so advised, the petitioner excepts and appeals to the judge, who hears and decides the appeal. . . . By the statute (1893, chapter 148; Revisal, sec. 2588) it was provided that, in condemnation proceedings by any railroad or by any city or town, 'any person interested in the land, or the city, town, railroad or other corporation, shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the Superior Court, in term, if upon the hearing of such appeal a jury trial be demanded.' This limitation upon the right to demand trial by jury clearly excludes the idea that any such right is given in respect to the questions of fact to be decided preliminary to the question of damages. In *Durham v. Riggsbee*, 141 N. C., 128, the question presented upon this

exception is discussed by *Mr. Justice Brown*. Referring to the allegation that the petitioner has been unable to acquire the title, and the reason therefor: 'While this is a necessary allegation of the petition, it is not an issuable fact for the jury to determine. The judge was right in refusing to submit it to the jury. Since the act of 1893 (Revisal, sec. 2588) the defendants had a right to demand a jury trial upon the matter of compensation.' "

We are also of opinion that the adjudication as to costs was in the discretion of his Honor.

Section 2589 of the Revisal provides that, "In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant are ascertained to exceed the damages to the land, (194) then the said company shall pay the costs of the proceedings, except as provided in section 1269, and shall not have a judgment for the excess of benefits over the damage," and section 1269, referred to, authorizes the judge to adjudge the costs in condemnation proceedings as it appears to him to be equitable and just, when in his opinion the privilege, use, or easement has been improperly refused.

It appears from the record that disinterested commissioners had reported that the special benefits to the defendants were equal to the damages, and that the defendants appealed, and upon the evidence submitted to a jury, a verdict was returned finding that the benefits exceeded the damages by $1,600.

On these facts, it was proper to require the petitioner to pay all costs accruing up to the time of the appeal from the clerk, and the defendants to pay the costs thereafter incurred.

There are several exceptions to parts of the charge which demand no particular discussion. The one principally relied on is that his Honor told the jury that, "In estimating damages of any kind to the lands of the defendants taken by the railroad company, it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property."

The only evidence as to the future use of the property was as to the development of the water-power, and the language used, standing alone, might be construed to exclude that as an element of damage; but the charge must be considered as a whole, and his Honor further charged the jury: "If the jury shall find there is a water-power on these lands, in estimating the value of such water-power the jury will take into consideration the feasibility and practicability of developing same, and the cost of its development, and if the jury shall find that the cost of developing said water-power is so great as to make it unprofitable, then no dam

ages will have been suffered by the defendants by reason of its alleged destruction. In connection with this water-power, the jury will take into consideration whether or not the same can be developed as completely with the railroad constructed as it could have been without
(195) the railroad being there, and if the jury shall find that this water-power can be developed as economically and so as to produce practically the same power now that the railroad has been constructed as it could have been before, then the defendants have suffered no damages to their alleged water-power by reason of the construction of the railroad. If the jury shall find that the water-power has a value, and that same has been damaged by the construction of the railroad, in assessing the damages the jury shall only consider the lands up to the mouth of Woodson Branch, over which the railroad runs. Defendants are entitled to no damages outside of those described in plaintiff's petition, and if other lands are required for the development of the water-power, then the defendants are entitled to damages for their proportionate part of such water-power. Defendants, or any of them, are not entitled in this suit to damages to lands on the opposite bank of the river from the railroad, unless you find the land of W. W. Gahagan on the opposite bank of the river from the railroad track was actually damaged as to water-power possibilities, as alleged by him. If there is such damage found actually and approximately to result, you may estimate such in fixing damages, if any is found."

The jury could not fail to understand, from this, that they were to estimate the damage to the water-power and its future development.

The case has, in our opinion, been fairly submitted to a jury, and we find no error which will justify disturbing the judgment rendered upon the verdict.

No error.

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(196)

KANAWHA HARDWOOD COMPANY v. FRANK WALDO ET AL.

(Filed 14 December, 1912.)

1. State's Lands—Grants—Fraud—Venue—Revisal—Interpretation of Statutes—In Pari Materia.

The various parts or sections of the Revisal of 1905 that are *in pari materia* are considered one and the same statute, and should be so construed as to determine the true intent of the Legislature, and "its clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts," and to give effect, if possible, to all of its clauses and provisions.

2. Same—Land in Several Counties.

While section 1748, Revisal of 1905, provides that any one claiming land under certain grants or patents, considering himself aggrieved by their issuance to any other person since the year 1776, against law or obtained by false suggestion, surprise, or fraud, may bring his action in the Superior Court of the county in which such land may be, for the purpose of having the grant repealed or vacated, etc., it should be construed in connection with section 419 of the Revisal, which provides that an action for the recovery of real property, etc., shall be tried in the county in which the subject of the action or some part thereof is situated; and when it appears, in an action for the cancellation of several grants, brought under the provisions of Revisal, sec. 1748, some of which lay in a different county from that wherein the action was brought, that the allegation of fraud and false suggestion involve one and the same transaction, affecting each and all of the grants, the subject of the litigation, it comes within the provision of section 419, and it is unnecessary to bring a separate action in respect to the grants issued in the other county, some of the lands, the subject of the action, lying in the county wherein the action was brought.

APPEAL by defendant from *Long, J.*, at August Term, 1912, of CHEROKEE.

Civil action, under section 1748 of the Revisal, to have canceled and declared void certain grants issued by the State of North Carolina to the defendants. There are involved in the suit between twenty-five and thirty grants, and the lands covered by all except three of the grants lie in Graham County. The defendants moved to have said action, so far as it affected the lands in Graham County, removed to (197) Graham for trial, and in support of their motion filed an affidavit. The plaintiffs filed a counter-affidavit. After argument of counsel, the court refused the motion of defendants and made an order to that effect. Defendants excepted to the ruling and order of the court, and appealed in open court to the Supreme Court.

Witherspoon & Witherspoon and Dillard & Hill for plaintiff.
J. H. Merrimon, J. N. Moody, and E. B. Norvell for defendant.

HOKE, J. Section 1748 of Revisal 1905 provides in effect that any one, claiming land under certain grants or patents, considering himself aggrieved by the issuance of any grant or patent to any other person since 1776, against law or obtained by false suggestion, surprise, or fraud, may bring his action in the Superior Court of the *county in which such land may be,* for the purpose of having said grant repealed or vacated, etc. In section 419, Revisal, being title VII, Civil Procedure, subject Venue, it is provided: That actions for the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries thereto, shall be tried

in the county in which the *subject of the action* or *some part thereof is situate*. The Revisal, enacted at the same session of the Legislature, is properly considered one and the same statute, and is subject, particularly those portions which are *in pari materia*, to the well-recognized rules of construction: "That in order to determine the true intent of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts." And again, "Statutes should be so construed, if possible, as to give effect to all of the clauses and provisions." Black Int. Laws, p. 166. These rules are in accord with well-considered decisions here and elsewhere. *Rodgers v. Bell*, 156 N. C., 385; *S. v. Lewis*, 142 N. C., 626; *Winslow v. Morton*, 118 N. C., 491; *Simonton v. Lanier*, 71 N. C., 498, and (198) applied to the present case, fully support the ruling made by his Honor. From a perusal of the pleadings, it appears that the allegations of fraud and false suggestion involve one and the same transaction affecting each and all of the grants, the subject of this litigation, and the cause comes well within the provision of 412, that actions for the determination, in any form, of a right or interest in real estate shall be had in the county "where the subject of the action or some part thereof is situate" (*Thames v. Jones*, 97 N. C., 126), leaving section 1748 to control in cases where there are separate transactions affecting distinct pieces of property lying wholly in different counties. There is no error, and the judgment of the Superior Court is affirmed.

No error.

W. C. KIRKPATRICK v. W. F. McCRACKEN.

(Filed 14 December, 1912.)

Deeds and Conveyances—Boundaries—Parol Evidence.

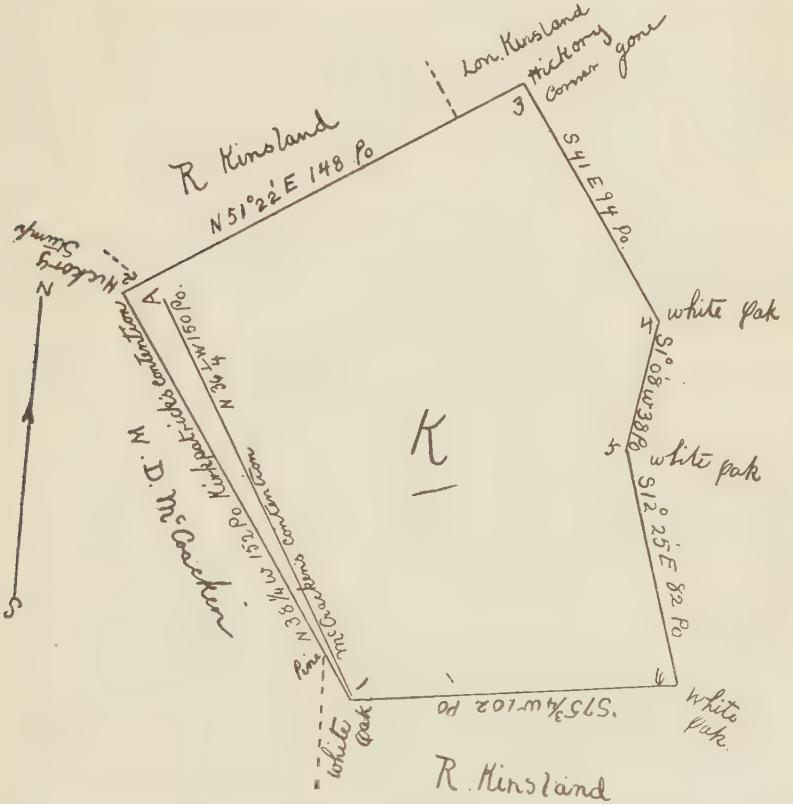
Where the divisional line between lands of adjoining owners is not well ascertained and cannot be located by the plain and unambiguous calls in the deed, it is competent to show by parol evidence its true location, and in this case it was competent to show, as evidence of the true line, that the parties had the line run by a surveyor under the agreement that it was to be by them recognized as the true line, had built a fence on it, which subsequently was destroyed by one of them.

APPEAL by defendant from *Lane, J.*, at January Term, 1912, of HAYWOOD.

This action involved the title to land. The usual issues were submitted and found for plaintiff and the damage assessed at $15. From the judgment rendered, defendant appealed.

S. C. Welch, Bickett, White & Malone for plaintiff.
W. T. Crawford, Smathers & Morgan for defendant.

BROWN, J. This controversy concerns the location of a boundary line between plaintiff's and defendant's lands, a prolific source of litigation between "Angry" Saxons, as said by the counsel for plaintiff. (199)



There is involved the narrow strip of land lying between the red line, 1 to A, and the black line, 1 to 2, on the map, the plaintiff's contention being represented by the black line and the defendant's by the red. The other lines shown on the map are not in dispute.

Both parties offered evidence tending to locate the line according to their respective contentions, which it is unnecessary to set out.

(200) The defendant excepts because the court admitted evidence that plaintiff and defendant had a division line run by Surveyor Parks and agreed that it was to be recognized as the true division line, and built a fence on it, which was afterwards destroyed by defendant.

We do not think the exception under the circumstances of this case can be sustained.

Where a division line between tracts of land is well ascertained, and can be located by the plain and unambiguous calls of the deed, the acts and admissions of the parties claiming the respective tracts are not competent evidence, either to change the line or to estop the party from setting up the true line. *Shaffer v. Gaynor,* 117 N. C., 15.

But where the dividing line is in dispute, and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper division line is evidence competent to be submitted to the jury. *Davidson v. Arlege,* 97 N. C., 172.

Parol evidence is competent to fix an uncertain controverted boundary. *Haddock v. Leary,* 148 N. C., 380.

Although held otherwise in this State, in many jurisdictions it is held that the settlement of a boundary by a parol agreement is not obnoxious to the statute of frauds. 5 Cyc., 931, and cases cited.

The reason for the rule obtaining in these jurisdictions is well stated in a Texas case, cited in the note as follows: "The reason of the rule is based upon the idea that the parties do not undertake to acquire and pass the title to real estate, but they simply fix and determine the situation and location of the thing that they already own, the purpose being simply by something agreed upon to identify their several holdings, and make certain that which they regard as uncertain." This view is also sustained by the text-books: Brown on Statute of Frauds, sec. 75; Reid on Statute of Frauds, sec. 746.

We think, however, the judge really confined this evidence excepted to the recovery of damages for the destruction of the fence.

The other assignments of error relate to the charge of the court. We deem it unnecessary to discuss them. The issue involved was one
(201) of fact, and we think, from an examination of the charge, it was properly and fairly presented to the jury.

No error.

H. J. BECK ET AL. v. THE BANK OF THOMASVILLE AND J. L. ARMFIELD.

(Filed 20 December, 1912.)

1. Instructions—Verdict, Directing—Evidence, How Considered.

When the trial judge directs a verdict against the plaintiff he is entitled to have his evidence, without regard to the defendant's contradictory evidence, considered in the light most favorable to him, as in judgments of nonsuit, for any competent evidence in his favor should be passed on by the jury.

2. Slander—Infamous Offense—Actionable Per Se—Interpretation of Statutes.

In an action to recover damages for slander, the defendant's accusation that plaintiff had embezzled lumber or money is equivalent to charging him with the commission of a felony, or infamous offense, punishable by imprisonment in the penitentiary, as in cases of larceny (Revisal, sec. 3406), and is actionable *per se*.

3. Slander—Actionable Per Se—Malice—Presumptions.

Malice, an essential element of slander, is generally presumed where the words spoken are actionable *per se*, until the truth thereof is proved, except where the occasion is privileged or *prima facie* excuses the publication.

4. Slander—Malice—Presumptions—Evidence—Rebuttal.

The presumption of malice, in an action to recover damages for slander, when the words spoken are actionable *per se*, may be rebutted.

5. Slander—Actionable Per Se—Evidence—Questions for Jury.

Where, in an action for slander, the words spoken are actionable *per se*, and the evidence is conflicting, the question should be submitted to the jury, with the burden of proof on defendant to show whether the defendant uttered the slanderous words maliciously, or whether they were true, and, if so, whether he was justified or excused in doing so.

6. Usury—Release—New Debt—Interest—Right of Borrower.

In an action to recover upon an usurious contract under our statute, usury in a certain sum was alleged, and upon reference it was ascertained that usury in a certain lesser sum had been received, and that the parties had come to an agreement whereby the lender was released from liability on account of the usurious transaction, being denominated in the release as "all amounts paid in excess of the legal rate of interest": *Held*, the borrower had the right to release the lender from liability on the usurious contract, and his release freed the original contract from the taint of usury, thereby making a new principal of indebtedness, bearing the legal rate of interest.

7. Appeal and Error—Lower Court—Judgment — Correction — Execution — Joined Causes—New Trial—Procedure.

The lower court, upon the report of the referee, having erroneously credited the defendant a certain sum on an usurious contract, in this case,

and the judgment in all other respects being approved on appeal, it is *Held*, that the judgment be accordingly amended, and execution issue thereon; and this action having been consolidated with an action of slander, and error therein found, a new trial is awarded therein.

(202) APPEAL by plaintiff from *Allen, J.*, at April Term, 1912, of DAVIDSON.

This case was before us at a former term, and is reported 157 N. C., 105. It is there stated that actions were brought by plaintiffs, the first to correct errors in their account with the defendant bank, plaintiffs alleging in this one of the actions that charges against them were wrongfully made by defendant bank, and checks were paid which were not drawn by them, and, further, that defendant bank refused to pay certain checks drawn by plaintiffs on it, when it had funds of plaintiffs on deposit fully sufficient to cover the total amount of the checks so drawn, and that by reason thereof plaintiffs were injured in their credit to the amount of $2,000. The other action was against the defendant J. L. Armfield, who was cashier of the bank, for defamation of character, and the plaintiffs make certain allegations therein as to the account between them, not necessary to be stated here, as they are eliminated by the referee's report and the rulings of the court thereon in favor of said defendant, the material allegation being that the defendant J. L. Armfield charged publicly, falsely, and wrongfully, in the presence of several persons named in the complaint, that the
(203) plaintiffs were bankrupt or in an insolvent condition, and would have to retire from business, and further, that the plaintiff H. L. Beck, had misapplied and embezzled lumber and money or funds, in his hands, belonging to others, with intent to injure H. L. Beck and the said firm, and thereby damaged the plaintiffs to the amount of $10,000.

The two actions were consolidated by consent, and the cause was then referred to Hon. E. L. Gaither to take and state an account of the transactions and dealings mentioned in the complaint, reserving the issues as to the slander for trial upon the coming in of the referee's report. The report was filed and several exceptions taken thereto by plaintiffs, some of which were allowed and others overruled. Plaintiffs then assigned errors and appealed, but the appeal was dismissed in this Court as premature (157 N. C., 105), as there was no final judgment, and the case was remanded to try the issues as to the slander, which were not submitted to the referee. That case was tried at April Term, 1912, of the Superior Court, upon the following issues:

1. Did the defendant Armfield publish of and concerning the plaintiff defamatory matters set out in the eighth parapraph of the plaintiff's complaint, as alleged in the complaint?

2. If so, were the same false and malicious?

3. Did the defendant Armfield publish of and concerning the plaintiff the defamatory matter alleged in the eleventh paragraph of the complaint, as alleged in said complaint?

4. If so, were the same false and malicious?

5. What damage, if any, are plaintiffs entitled to recover?

A witness for the plaintiffs testified that the defendant J. L. Armfield had, in his presence and hearing, charged that H. L. Beck had embezzled certain lumber, and that if he did not arrange the matter to his satisfaction, he would have to "take him up for it." Another witness testified that Armfield had said to him that Beck was "in pretty narrow straits; in other words, he said that Beck had acted as an embezzler. We give his words here: "I can't tell the words exactly, but that he had embezzled some one out of the money he had received on that note, and the best way out of it was for Beck to give us the mortgage and we could indorse it to him, and that Beck was liable for criminal prosecution. He said Beck had embezzled funds not properly applied, or something to that effect, and that he was (204) liable for a penitentiary crime; that was the substance of what he said." This witness also stated that Armfield had threatened Beck with a criminal prosecution in order to obtain a mortgage for a debt the bank or Armfield held against him. There was evidence that Armfield said that he could put Beck in the penitentiary, and that the persons to whom he was speaking, Hall and Daniels, had better accept the new note and mortgage from Beck and assign it to the bank to make good his defalcation, as it was all in their family; and the note and mortgage were executed in consequence of the threat, and turned over to the bank, of which Armfield was the cashier. Armfield further stated that Beck had embezzled, and, "if he did not mind, he would be put in the penitentiary." Plaintiffs then offered in evidence the following part of paragraph 8 of defendant's answer: "The defendant admits telling Christopher Shaw that H. L. Beck was, in defendant's opinion, liable for prosecution, not only in the Delk matter, but on account of his conduct to defendant and others." Also a part of paragraph 11 of defendant's answer, viz., "and (he) does not deny having said that, in his opinion, the defendant H. L. Beck was liable to criminal prosecution." J. L. Armfield was a witness in his own behalf, and among other things testified: "I said to Christopher Shaw that I thought that H. L. Beck had done such dirty business that he was liable to be criminally prosecuted, and I say that now. I did not mean that as much about the Delk matter as the other matters, no more about that than others. When I stated in the eighth paragraph of my answer the following, 'Not only on account of the Delk matter, but on account of his other

dealings,' that is a mistake; it is a typographical error. I did tell Christopher Shaw that H. L. Beck was liable to prosecution, not on account of the Delk matter, but other matters. When I made my answer I told my attorney to put it there, not on account of the Delk matter, but other matters. Shaw told me he had understood that there were some papers there with my signature to them. I did not intend to convey to the
(205) mind of Delk in that letter that Beck had improperly signed my name to any papers. I was in my usual humor when I wrote it."

The "Deck matter" to which he refers in his testimony was a letter written by J. L. Armfield to John B. Delk, 12 February, 1907, as follows:

DEAR SIR:—I have just learned that you have a contract with H. L. Beck on which my name appears, and I beg to notify you that this contract was made without my knowledge or consent, and that at no time have I ever authorized him to sign any agreement or contract for me, and that at no time have I been in partnership business with him.

Yours truly,

J. L. ARMFIELD.

H. L. Beck testified that there was such a partnership arrangement, and that he committed no fraud or embezzlement. There was much more testimony, but we have given the above summary, which will sufficiently show the bearing of the evidence upon the issues and ruling of the court.

Plaintiff's excepted to the ruling of the court, which directed a verdict for the defendant upon the issues, and appealed to this Court.

E. E. Raper and T. J. Shaw for plaintiffs.
Justice & Broadhurst for defendants.

WALKER, J., after stating the case: We are of the opinion that there was error in the ruling of the court. The question being, whether there was any evidence to be submitted to the jury, it is not necessary that we should set out the testimony of the defendant, which tends to contradict that of the plaintiffs, for if there is any evidence to support the plaintiffs' case, they are entitled to have it submitted to the jury, and as the court directed a verdict against them, the plaintiffs are entitled to have us consider it in the most favorable view for them. It is like a nonsuit in this respect, and we have frequently said so in such cases.

Brittain v. Westhall, 135 N. C., 492; *Freeman v. Brown,* 151
(206) N. C., 111; *Cotton v. R. R.,* 149 N. C., 227; *Deppe v. R. R.,* 152 N. C., 79; *Dail v. Taylor,* 151 N. C., 289; *Hamilton v. Lumber Co.,* 156 N. C., 519.

It will be seen from our recital of the material parts of the testimony that there is ample proof of the fact that the defendant uttered the slanderous and defamatory words imputed to him. As the accusation he made, that plaintiff, H. L. Beck, had embezzled lumber or money, was equivalent to charging him with the commission of a felony, or an infamous offense punishable by imprisonment in the penitentiary, "as in case of larceny" (Revisal, sec. 3406), the burden is cast upon the defendant to prove the truth of the charge, or any matter in justification or mitigation. *Osborn v. Leach,* 135 N. C., 628; *Ramsey v. Cheek,* 109 N. C., 270; *Harris v. Terry,* 98 N. C., 131; *McKee v. Wilson,* 87 N. C., 300. Malice, which is an essential element of slander, is, generally speaking, presumed where the words are actionable *per se,* until the contrary is proved, except in those cases where the occasion is privileged or *prima facie* excuses the publication. This presumption, however, may be rebutted. Newell on Slander and Libel (2 Ed.), p. 39 (5) and 319, sec. 12, and cases *supra.* The question, therefore, whether the defendant maliciously uttered the slanderous words, and further, whether he was justified or excused in doing so, were clearly for the consideration of the jury, with the burden shifted to the defendant, if he did utter the words, to prove that they were true, or if not true, then to show matters in excuse or justification. There was sufficient evidence in this case to carry it to the jury and to place the burden of showing all defensive matter, including the truth of the accusation, upon defendant, because plaintiff had offered evidence that the charge was made in unambiguous and explicit terms, and that it was false. It involved, of course, the imputation of an infamous crime.

Coming to the account, as the matter is now before us on an appeal from a final judgment, we find that the main exception relates to the ruling of the court upon the question of usury. Plaintiffs made to J. L. Armfield on 16 May, 1906, their note for $5,500, secured by a mortgage on the property of the partnership, which was duly executed by them and their wives. It appears that they only received $4,500, and, as they alleged, the balance, or $1,000, was usurious interest. While (207) the referee did not find explicitly that the $1,000 was illegal interest, he did find that the plaintiffs came to a settlement with the defendant, or the defendant with them, and the negotiations resulted in an agreement of compromise, which was reduced to writing and the substance of which is that J. L. Armfield agreed to pay and the plaintiffs to receive the sum of $600, and the latter, in consideration of the said sum, released Armfield from any and all liability for and on account of the said usurious transaction, and it is so denominated in the release, being called by circumlocution "all amounts paid in excess of the legal

rate of interest for any and all money heretofore loaned to (plaintiffs) by J. L. Armfield," and "the said excess being $600, and the payment of the same, it is agreed, shall be in full settlement of all liability therefor and of any and all causes of action which can arise therefrom." This was undoubtedly an admission of the defendant that the transaction in which he took the note for $5,500 was tainted with usury, and that he was in danger of losing, not only his legal interest on the note, but double the amount of interest which had been paid to him by his debtors. He, therefore, very prudently and wisely set about to make terms with the plaintiffs, and to relieve him of this statutory liability, by paying $600 in compromise and adjustment of the whole amount that might have been exacted. "The statutes of usury being enacted for the benefit of the borrower, he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so. It is, therefore, held that when the debtor becomes a party to a general settlement of preceding usurious transactions, made fairly and without circumstances of imposition, his recognition of the amount agreed to be due as a new obligation will preclude his setting up the old usury in defense of the new debt. This rule is not held to apply, however, unless it is clear that the debtor has fully accepted the settlement as a just debt separate and distinct from the preceding usurious obligations." 39 Cyc., p. 1024. The $600 thus paid to the plaintiffs became their money, and was in no way involved in the account. Its payment in final settlement of the usurious transaction simply purged it of the taint, or eliminated
(208) the usurious feature, and reduced the principal to $4,500. That was the new principal and bore legal interest. If it be treated as a voluntary payment of money with full knowledge of the facts, which of course he had, it could not be recovered by direct action, or by way of set-off or counterclaim, there being no fraud, duress, or other equitable element in the transaction. 30 Cyc., 1298. The referee charged the plaintiffs, in the account between them and J. L. Armfield, not only with the note for $4,500, but also with the amount of $600, which had been received in settlement of the usury. This was error, and the mere fact that he had debited the plaintiff only with $4,500, deducting the illegal interest of $1,000 from the original principal of the note, did not warrant the charge. The settlement required this reduction of the principal to $4,500, and $600, which was the consideration of it and the release of all causes of action for the usury, belonging necessarily to the plaintiffs. The judge sustained plaintiff's exception No. 9 (intended probably for 8) and No. 13, and directed the $200 to be deducted from the amount, $1,314.80, found to be due the Bank of Thomasville, with an allowance

for interest. He also allowed a credit for the item of $575 claimed by the plaintiffs, and the one for $130 and interest, it being the $200 due for lumber, less $70 paid by defendant for freight charges. The judge, in passing upon the referee's report, found that the plaintiffs were indebted to the bank in the sum of $1,314.80, less the $200 credit and interest from 1 August, 1910, until paid, and so adjudged. He then found that plaintiffs were indebted to J. L. Armfield in the sum of $6,738.75, less the two credits of $575,with interest from 1 January, 1908, and $130 and interest from 1 August, 1910, and so adjudged. The last judgment was erroneous, as it includes the sum of $600, which was improperly charged to the plaintiffs, as we have already shown. The said judgment, the one in favor of J. L. Armfield, will be reformed so as to strike out the said charge and all interest therein, and the account will be restated, and the net balance due by plaintiffs to J. L. Armfield will be ascertained, upon the basis of our ruling that defendant is not entitled to credit for the $600. In all other respects, the judgment of the court upon the report of the referee (209) is approved, the remaining exceptions of the plaintiffs being, in our opinion, without merit. The credits allowed by the judge to the plaintiffs and interest will, of course, be deducted as ordered by him.

The clear result is that the account must be amended so as to conform to our opinion, and judgment entered accordingly, executions to issue thereon, and a new trial is ordered of the issues raised by the pleadings as to the slander or defamation of character. The court, no doubt, will permit the plaintiffs to amend their complaint, if so advised, so as to agree more closely with the evidence they have adduced.

Error.

Cited: *Greer v. Lumber Co., ante,* 146

W. S. CHADWICK v. THE NORFOLK SOUTHERN RAILWAY ET ALS

(Filed 25 September, 1912.)

Appeal and Error—Processioning Lands—Fragmentary Appeal—Order Remanding Cause to Clerk—Practice.

An appeal from the order of the Superior Court judge reversing the judgment of the clerk of the court and remanding the cause to him to the end that the proper order for a survey be made in proceedings to procession lands, under Revisal, sec. 326, is premature, and a motion to dismiss should be allowed; exceptions should have been taken to the order and the final result appealed from.

CHADWICK *v.* LEWIS.

APPEAL from an order of *Foushee, J.*, heard at chambers, 11 March, 1912, from CARTERET.

This is a processioning proceeding.

Guion & Guion for plaintiff.
E. H. Gorham, C. R. Thomas, J. F. Duncan for defendants.

PER CURIAM. The plaintiff moves to dismiss this appeal in this Court upon the ground that the same is premature. The clerk of the Superior Court dismissed the proceedings.

Upon appeal at chambers, the judge presiding in the Third (210) Judicial District reversed the judgment of the clerk and remanded the same to him, to the end that the proper order be made of survey, etc., in accordance with the statute. Revisal, 326.

We are of opinion that the motion to dismiss this appeal because it is premature should be allowed. It was the duty of the defendant to have noted every exception and let the cause proceed to the hearing under the statute, and then, if dissatisfied with the final result, upon exceptions properly taken, the cause can be heard in the Superior Court, and thence by appeal to this Court.

Appeal dismissed.

W. S. CHADWICK ET ALS. V. JOHN H. LEWIS.

(Filed 25 September, 1912.)

APPEAL by plaintiff from *Whedbee, J.*, at June Term, 1912, of CARTERET.

Processioning proceeding. The following issue was submitted:

"What is the true dividing line between the lands of plaintiffs and defendant? Answer: "B, C, K, and J, as shown on map."

The plantiffs appealed.

J. F. Duncan and Guion & Guion for plaintiffs.
Moore & Dunn, E. H. Gorham, and Abernethy & Davis for defendant.

PER CURIAM. The issue involved is almost entirely one of fact. In submitting it to the jury we find no error in the rulings of the court.

No error.

(211)

IN RE JOHN WILSON, EX PARTE.

(Filed 16 October, 1912.)

Partition—Parties—Appeal and Error—Motions—Estoppel.

A party to proceedings to partition lands, who was present at the sale and received his share of the purchase money, may not, after confirmation of the matters adjudicated and affirmed on appeal, by motion in the original cause, have the sale set aside as to him.

APPEAL by Colin Lee and Bryant Timber Company from *Ferguson, J.*, at September Term, 1912, of SAMPSON.

J. D. Kerr, Sr., for Mrs. Colin Lee.

George E. Butler and Cyrus M. Faircloth for Bryant Timber Company.

Faison & Wright for John E. Wilson, appellee.

PER CURIAM. This cause was before the Court at a former term, 148 N. C., 438.

Mrs. Colin Lee now moves in the original cause to set aside the judgment and sale for division as to her.

Her own deposition proves she was made a party to the partition proceeding, was present at the sale and received her share of the purchase money. His Honor properly dismissed her petition.

Affirmed.

JUNIE BREWER v. MINEOLA MANUFACTURING CO.

(Filed 1 November, 1912.)

Appeal and Error—Case on Appeal—Unsigned Entries of Record—Stenographer's Notes—Concise Statement—Interpretation of Statutes.

When the stenographer's full notes of the evidence taken on the trial of a case on appeal are transcribed in the record, immediately followed by an unsigned entry, repudiated by appellee's counsel, that "the record, stenographer's notes, the judgment, and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court," the case on appeal is not properly constituted in this Court, and, on motion of appellee's counsel, will be dismissed and the judgment below affirmed. The attention of the profession is again directed to the line of cases holding that a full transcript of the stenographer's notes of the evidence is not in conformity with the requirments of Revisal, sec. 591.

APPEAL by plaintiff from *Whedbee, J.*, at August Term, 1912, (212) of GUILFORD.

From a judgment of nonsuit the plaintiff appeals.

The facts are sufficiently stated in the *per curiam* opinion.

John A. Barringer, Adams & McLean for plaintiff.

F. P. Hobgood, Jr., for defendant.

PER CURIAM. Defendant's attorney moves in this Court to dismiss the appeal and affirm the judgment for the absence of a properly constituted case on appeal.

The stenographer's full notes of the trial in the Superior Court are copied in the record. Immediately following them we find the following entry: "The record, stenographer's notes, the judgment and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court."

This is not signed by either the presiding judge or by the counsel for the plaintiff or defendant. It is repudiated by the counsel for the defendant in this Court, who moves to affirm the judgment for lack of a case on appeal. The motion must be allowed.

There appears to have been no attempt to make out a case on appeal in conformity with the statute. That offered as a case on appeal is neither signed by the judge nor by the counsel.

In this connection we again call the attention of the profession to what has been said on the subject of "Cases on Appeal" in *Cressler v. Asheville*, 138 N. C., 483; *Bucken v. R. R.*, 157 N. C., 444; and in *Skipper v. Lumber Co.*, 158 N. C., 322.

In the latter case it is held that: "When the appellant has set out in the case on appeal the transcribed stenographer's notes, he fails to
(213) prepare a concise statement of the case as required by Revisal, 591, and his appeal will be dismissed under Rule 22 of the Supreme Court when upon examination no error is found in the record proper."

Appeal dismissed and judgment affirmed.

M. D. McCALL v. J. T. SUSTAIR ET AL.

(Filed 11 December, 1912.)

PETITION to rehear this cause by plaintiff, reported in 157 N. C., 179.

Burwell & Cansler, R. S. Hutchinson, and McCall & Smith for plaintiff.

Stewart & McRae and Maxwell & Keerans for defendant.

PER CURIAM. We have considered carefully the petition to rehear in this case and the briefs filed by the learned counsel for the plaintiff in support of it, as well as those filed by the defendant.

The majority of the Court is of opinion that no authority was overlooked in the opinion of the *Chief Justice* and that no question has been raised by the petition to rehear which was not considered on the former hearing.

We are of opinion that the case was fully covered by the opinion of the *Chief Justice*, affirming the judgment of his Honor, *Judge Biggs*.

The petition to rehear is dismissed.

WALKER, J., and HOKE, J., dissenting.

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(214)

J. P. GUPTON ET AL. v. W. T. SLEDGE ET AL.

(Filed 20 November, 1912.)

1. Appeal and Error—Time for Docketing—Motion to Dismiss—Appellee's Laches.

When appellant's case is not docketed seven days before the call of the district in the Supreme Court to which it belongs, and the appellee fails at that time to move to dismiss, the latter is in laches, and the appellant can docket his case, if this is done before motion to dismiss is made.

2. Same—Subsequent Term—Practice.

Appellant being allowed to docket his case, owing to appellee's laches, too late to be heard at the term to which it belongs, appellee's motion to dismiss for failure to print briefs and record should be made at the next term at the time required.

3. Appeal and Error—Service of Case—Time Extended by Agreement—Power of Court—Judgments.

When time to serve case on appeal has been extended, by consent of counsel, beyond that which the statute allows, and it appears that appellant had not served his case within the time agreed upon and appellee's counsel has accepted service thereof, reserving his objection as to the time of service, the trial judge is without authority to settle the case, and upon no error being found on the examination of the record proper, the judgment below will be affirmed.

APPEAL from *W. J. Adams, J.*, at May Term, 1912, of CATAWBA.

W. H. Yarborough, Jr., Councill & Yount, and W. H. Ruffin for plaintiffs.

W. A. Self for defendants.

CLARK, C. J. The plaintiff moved to dismiss because the transcript on appeal was not docketed seven days before the call of the docket of the district to which it belongs. This motion was denied, for, though the record was not then docketed as required, the appellee did not move to dismiss at that time, but delayed to make his motion till the call of the district was begun, at which time the case had been docketed. The appellee being in laches himself, the appellant could docket his case at any time at this term, if before the appellee moved to dismiss. *Benedict v. Jones,* 131 N. C., 473; *Laney v. Mackey,* 144 N. C., 630.

The case thus being docketed, though too late for hearing at this term, a motion to dismiss for failure to print the record and file printed brief cannot avail, as these things are required to be done at the time required before the call for hearing at the next term.

(215) The appellee further moves, however, to affirm because there is no case settled on appeal, and the appellant moves for a *certiorari* to have the case settled. The facts are that the case was tried at May Term, 1912, of Catawba, which adjourned on 15 May, 1912. By consent, thirty days was allowed the appellant to serve case on appeal, which was afterwards extended by consent ten days longer. This time expired 4 July. The appellant did not attempt to serve case on appeal till 6 July, when the appellee's counsel accepted service, reserving, however, his objection that the time had expired. The judge when appealed to properly refused to settle the case, upon that ground. The time in which the "case on appeal" must be served is fixed by statute, and the court cannot extend it. *Cozart v. Assurance Co.,* 142 N. C., 522, and cases cited. When a different time is substituted by the agreement of the parties, the court cannot extend that time. *Ib.* The appellant shows no action on the part of the appellee which caused him to delay serving his case on appeal within the stipulated time. Nor is there any exception in appellant's case on appeal which would justify a new trial. Upon examination of the record proper, we find no error, and the judgment below must be

Affirmed.

JAMES HARTSOE ET ALS. v. SOUTHERN RAILWAY COMPANY AND CITY OF HICKORY.

(Filed 14 December, 1912.)

Consent Judgments—Appeal and Error—Costs.

A verdict having been rendered against two joint defendants, in an action for damages for a personal injury negligently inflicted, a consent judgment was entered between the plaintiff and one of the defendants, making it primarily liable in a smaller sum than that ascertained by the jury, with the right of plaintiff to recover out of the codefendant if the defendant primarily liable did not pay it, but which it subsequently did pay, taking an assignment of the judgment, to a trustee: *Held*, an appeal by either or both defendants cannot be had, the judgment having been entered by consent, and with respect to the one secondarily liable, the appeal being for costs only, will not lie.

APPEAL by defendant from *Lyon, J.*, at July Term, 1912, of (216) CATAWBA.

S. J. Ervin for Southern Railway Company.
A. A. Whitener for City of Hickory.

PER CURIAM. In this case the jury found for their verdict that the plaintiff was injured by the negligence of the defendant, and that the Southern Railway Company was primarily liable and that plaintiffs were entitled to recover $1,500 damages. The following judgment was rendered:

"Ordered by consent of plaintiffs and Southern Railway Company, and adjudged, that the plaintiffs recover of the defendant the Southern Railway Company first and primarily the sum of $1,000 and costs of action, the amount of the recovery being, by consent of the Southern Railway Company and the plaintiffs, reduced to said sum, and in the event of the failure of the plaintiff to recover said sum out of the defendant the Southern Railway Company, then the plaintiffs shall recover the said sum of $1,000 out of the defendant the City of Hickory, together with the costs of the action."

It is made to appear to the Court, and is admitted, that the Southern Railway Company subsequently paid the $1,000 to the plaintiff and took an assignment of the judgment to a trustee for its benefit. The appeal of both the Southern Railway and the city of Hickory must be dismissed. The judgment of record is a consent judgment, and not merely to the reduction thereof to $1,000, which reduction would not require the assent of the Southern Railway Company, but there is consent to the judgment itself. No appeal can be sustained from a consent judgment.

The appeal of that company being dismissed, there is no ground on which to entertain the appeal of the city of Hickory, which was improvidently taken. Besides, the Court would not discuss the proposition involved in this appeal simply to determine the matter of costs of the appeal, the subject-matter thereof having been terminated by payment of the judgment. *Herring v. Pugh,* 125 N. C., 437, and cases cited.

As to both defendants let it be entered,

Appeal dismissed.

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(217)

MARY QUEEN, ADMINISTRATRIX, v. SNOWBIRD VALLEY RAILROAD COMPANY.

(Filed 14 December, 1912.)

1. Appeal and Error—Appeal from Judgment—Assignment of Error—Motions.

An appeal from the judgment rendered is of itself an assignment of error, and the case on appeal will not on motion be dismissed on the ground that no error was therein assigned by appellant.

2. Appeal and Error—In Forma Pauperis—Leave to Appeal—Practice.

To appeal as pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient

3. Appeal and Error—Case—Settlement by Judge—Practice.

It is necessary that the trial judge settle the case on appeal when the parties do not agree.

APPEAL from *Webb, J.,* at Special Term, 1912, of GRAHAM.

J. N. Moody, A. D. Raby, for plaintiff.
Dillard & Hill, M. W. Bell, Morphew & Phillips for defendant.

PER CURIAM. This is an appeal from a nonsuit. The defendant's motion to dismiss because there is no assignment of error cannot be allowed, because the appeal from the judgment is of itself an assignment of error. *Wilson v. Lumber Co.,* 131 N. C., 163, and cases there cited; *Mershon v. Morris,* 148 N. C., 51.

But there is no case on appeal settled by the judge or by counsel. The evidence in the shape of question and answer is dumped into the record, and there is nothing to show that it is correct. Besides, while there is leave to sue as a pauper, there is no leave to appeal as a pauper, no appeal bond, and no printed record nor any printed brief on behalf of the plaintiff.

Appeal dismissed.

(218)

BOARD OF EDUCATION OF GRAHAM COUNTY v. B. M. ORR ET ALS.

(Filed 14 December, 1912.)

1. Appeal and Error—Parol Agreement.

A parol agreement made between the parties to an appeal will not be considered by the Supreme Court if denied.

2. Appeal and Error—Written Agreement—Time to Serve Case—Computation—Interpretation of Statute.

When there is a written agreement made between the parties to an action extending the time allowed by the statute as to the service of the case, counter-case, or exceptions, the service by either of the parties after the time specified therefor in the agreement is void; and computing the time, the first day allowed in the time extended is counted as well as the last, allowing the full number of days agreed upon.

APPEAL by plaintiff from *Webb, J.*, at Special Term, 1912, of GRAHAM.

Morphew & Phillips for plaintiff.
A. D. Raby for defendants.

CLARK, C. J. This case came up on the appellant's appeal, the appellee's counter case not having been served in time.

The defendant moved for a *certiorari* to send up the appellee's case as the case on appeal because the appellant had not sent the papers to the judge to be settled on appeal. The appellee's counsel filed an affidavit that there was an oral agreement between himself and the counsel for the appellant to waive the stipulation as to the time of serving the counter-case. The appellant's counsel filed counter-affidavits denying such agreement. According to the settled practice of this Court, we cannot decide when the recollection of counsel in such matters differs. Such agreements should always be in writing to prevent such controversies as this. When this is not done, the Court will decline to consider the alleged agreement at all.

In *Graham v. Edwards*, 114 N. C., 230, the Court said: "We again repeat, as was lately said in *Sondley v. Asheville*, 112 N. C., 694: 'It is to be hoped that hereafter counsel will in every instance put their agreements in writing or have them entered of record, when for any reason they may think best to depart from the plain pro- (219) visions of the statute. If they do not care to do this, the courts will not pass upon controversies as to the terms or existence of such agreements.' Our brethren of the bar owe it to themselves and to the courts to avoid bringing such controversies hereafter before the courts. Their experience as lawyers must impress upon them the treachery of memory among the very best of men. If not disposed

to guard against differences of recollection by the easy mode of reducing agreements to writing, or having them entered on the minutes, the courts have no process to gauge the accuracy of their respective recollections." This case has often been cited since. See citations to this case in the Anno. Ed. of 114 N. C., 230.

The defendant further contends that his counter-case was served in time under the agreement of record. This agreement was that the "appellant's case should be served in thirty days and the appellee's in thirty days thereafter." Court adjourned on 27 June. The appellant's case on appeal was served on 27 July. The appellee's counter-case was served on 27 August, which, there being thirty-one days in July, was the 31st day thereafter, and too late. The appellee contends that under Revisal, 887, as to the computation of time, "excluding the first day and including the last," the day (27 July) on which the appellant's case was served should not be counted and that the next day (28 July) should be considered the first day and also excluded, and therefore service of the counter-case on 27 August was in time. This is ingenious, but not sound. The first day on which the counter-case could have been served was 27 July, the day on which the appellant's case was served on the appellee, and this is excluded. While it was not probable that the appellee would serve his counter-case on that day, still had he done so it would have been legal. The reason the first day is excluded is because it is usually only part of a day.

To give the appellee the addition of another day by excluding, in addition, 28 July also, would reverse all our holdings, in numerous cases. For instance, when court adjourned on 27 June, if no notice of appeal was then given, the appellant could have given it "in ten days thereafter." In making the computation, 27 June, the day of adjournment,
would be excluded, and notice must have been given, at the latest,
(220) some time on 7 July. He would not have been allowed to consider
28 June as the first day and exclude that also, so as to make service on 8 July sufficient. The service of process must be made ten days before the return day, which is on Monday of court. Hence service on Friday is sufficient, because, excluding that day and including Monday, there are ten days. Upon the rule contended for by the appellee of excluding the first day of the ten days, service would have to be made on Thursday.

In numerous cases where by agreement "thirty days to serve case of appellant and thirty days thereafter to serve counter-case," the same computation that we hold in this case has always been observed. *Mitchell v. Haggard,* 105 N. C., 173; *Hardee v. Timberlake,* 159 N. C., 552. The first day on which the act could have been done, which here was on

27 July, is excluded and thirty full days, counting 28 July as one of them, expired 26 August. There must always be some time specified either by statute or agreement, and the failure to observe the time is fatal, whether it is by one day or more. If the specific time is to be exceeded, there is no rule to measure such time that can be allowed in excess. There is an exception when there is fraud or misrepresentation, which is not alleged here, or a waiver, which cannot be shown if denied, unless the waiver is in writing.

The case must therefore be heard upon the appellant's case on appeal which is sent up in the record.

Motion denied.

W. E. BATEMAN v. E. B. HOPKINS.

(Filed 14 December, 1912.)

Appeal and Error—Contracts—Interest—Writ of Possession—Supreme Court—Motions—Cost—Practice.

It having been determined on a former appeal in this case that under the contract entered into between the parties that the plaintiff should pay a certain sum of money into the Superior Court and defendant cancel certain outstanding notes and mortgages against the plaintiff's property, it is *Held*, that the defendant is not entitled to interest on the outstanding notes he has paid, and a decree is entered in the Supreme Court that the defendant immediately execute and deliver to plaintiff a deed of general warranty to the lands described in the complaint, and that after twenty days a writ of possession issue from the Superior Court; that defendant pay costs incident to his motion.

APPEAL by defendant from *Webb, J.*, at Spring Term, 1912, of (221) TYRRELL.

This is a motion by the plaintiff, after notice, for a decree commanding the defendant to execute a deed to him with general warranty, for the land described in the complaint, and for a writ of possession.

After the last opinion was filed in this case, the plaintiff paid $1,000 into the office of the Clerk of the Superior Court of Tyrrell County, and the notes to J. C. Meekins, Sr., have been surrendered and the mortgage executed to secure the same has been canceled of record.

The defendant resists the motion upon the sole ground that, pending this litigation, he has paid interest to J. C. Meekins, Sr., amounting to $600, and insists that the plaintiff should be required to pay him this sum.

PER CURIAM. The plaintiff is entitled to the decree he demands. The contract between the plaintiff and defendant was to pay the defendant $1,000 and to release the lands from the mortgage to J. C. Meekins, Sr., and the contract has been fully performed. The last appeal of the defendant was based on this contention. He then said that the plaintiff had not agreed to pay any certain amount, except as to $1,000, but that he had agreed to satisfy the mortgage, and his view prevailed in this Court.

The sum of $600 paid as interest was upon a debt he owed, and was not induced by any request or conduct of the plaintiff.

Let the decree be entered. The cause is retained.

DECREE.

The plaintiff, after due notice to the defendant, moves the Court for a decree commanding the defendant to execute a deed to him with general warranty, and for a writ of possession, and it appearing (222) to the satisfaction of the Court that since the opinion was filed in this action, that the plaintiff has paid into the clerk's office in Tyrrell County the sum of $1,000 for the use of the defendant, and has also marked "Satisfied" the notes referred to in the pleadings, due to J. C. Meekins, Sr., and has caused to be canceled of record the mortgage or trust deed securing the payment of said notes, and has otherwise fully complied with the judgment of this Court, it is now ordered, adjudged, and decreed that the defendant, E. B. Hopkins, immediately execute and deliver to the plaintiff a deed with general warranty conveying to him in fee simple the lands described in the complaint in this action.

It is further adjudged and decreed that, upon application of the plaintiff, the clerk of this Court issue a writ, directed to the Sheriff of Tyrrell County, requiring him to put the defendant out of possession of said lands and to put the plaintiff in possession thereof, but that this writ shall not issue in less than twenty days from this 18 December, 1912.

It is further ordered that the defendant pay the costs of this motion.

The clerk of this Court will certify a copy of this judgment to the Superior Court of Tyrrell County at once, in order that a copy of the same may be served upon the defendant, and that it may be entered upon the records of the Superior Court of said county.

BOARD OF COMMISSIONERS OF MACON COUNTY v. W. J. ZACHARY.

(Filed 14 December, 1912.)

Evidence—Questions for Jury.

This action, to locate the boundaries of a public square of a town, involves an issue of fact, upon which the verdict of the jury is conclusive.

APPEAL by defendant from *Lyon, J.*, at Spring Term, 1912, of MACON.

These issues were submitted:

1. Is the plaintiff the owner of and entitled to the possession of the land described in the amended complaint of the plaintiff? (223) Answer: Yes.

2. Is the defendant in the wrongful possession of any part thereof, and if so, what part? Answer: All his possessions south of the red line indicated by the map, being 8 feet and 4 inches covered by the front part of the building on the lot.

From the judgment rendered, defendant appealed.

J. Frank Ray for plaintiff.

George L. Jones and R. D. Sisk for defendant.

PER CURIAM. The matter at issue in this case is the true location of the public square in the town of Franklin. We think the question is one of the fact almost exclusively, and that there was no substantial error committed in submitting it to the jury.

No error.

STATE v. ORREN BULLOCK.

(Filed 3 October, 1912.)

Roads and Highways—Hauling Timber—License Tax—Uniformity—Constitutional Law.

An act which makes it a misdemeanor, punishable by a fine not exceeding $50, for any person or corporation to carry on the business of hauling logs, timber, or lumber over road districts laid out and created in a certain county without having obtained a license therefor, to be issued by the road commissioners in a prescribed manner, grading the license with reference to the number of horses driven to the wagon used, the money collected to be paid over to the treasurer of the county by the road commissioners, and held to the credit of the district collecting it, is uniform in its application, and not discriminative, and is not repugnant to the State Constitution, Art. V, sec. 3; Art. I, sec. 7; Art. I, sec. 17; and to the XIV amendment to the Constitution of the United States. *S. v. Holloman*, 139 N. C., 642; *Dalton v. Brown*, 159 N. C., 175, cited and applied.

STATE *v.* BULLOCK.

APPEAL by defendant from *Cooke, J.*, at April Term, 1912, of NASH.

The defendant was convicted in the Superior Court of Nash (224) upon appeal from a justice of the peace, upon a warrant charging that he had carried on the business of hauling logs, etc., without obtaining a license therefor, in violation of the provisions of chapter 451, Laws 1911.

The defendant moved in arrest of judgment, for that the indictment and judgment in this action are based upon a statute which violates the Constitution of North Carolina and the Constitution of the United States, and is invalid. Constitution of North Carolina, Art. V, sec. 3; Art. I, sec. 7; Art. I, sec. 17. Constitution of United States, fourteenth amendment.

The motion was overruled, and the defendant excepted and appealed.

Attorney-General Bickett and T. H. Calvert for the State.
James H. Pou and Murray Allen for defendant.

ALLEN, J. The statute under which the defendant was convicted (chapter 451 of Public-Local Laws of 1911) reads as follows:

"That it shall be unlawful for any person or corporation to carry on the business of hauling logs, timber, or lumber over the roads of any one of the road districts above laid out and created, without first having obtained a license therefor; and any person or corporation carrying on the business of hauling logs, timber, or lumber as aforesaid, without having first obtained license, shall be guilty of a misdemeanor, and shall be fined not more than $50. Said license shall be issued by the road commissioners of the road district or township over the roads of which the wagon or wagons are driven, and will be signed by the chairman and countersigned by the clerk of said road commission. The license tax which said road commission in each township is to collect is as follows, to wit: for each one-horse wagon, $5 for each year or part of a year; for each two-horse wagon, $10 for each year or part of a year; for each three-horse wagon and four-horse wagon, $15 for each year or part of a year; for each wagon drawn by more than four horses or mules, $20 for each year or part of a year. The money thus collected from license taxes as aforesaid shall be paid over to the treasurer of the county of Nash by the road commissioner collecting the same, to be held (225) to the credit of the township or road district so collecting. Any district or township in which wagons are operated shall be entitled to collect the license tax without respect to its having been collected by any other township."

If this statute is compared with the one under consideration in *S. v. Holloman*, 139 N. C., 642, and the one in *Dalton v. Brown*, 159 N. C.,

175, it will be found to be in all material respects like the one sustained by a unanimous Court in the first, and that it meets the objections of the justices dissenting in the second. In the *Holloman case* the statute was as follows: "That any person, firm, or corporation desiring to use any of the public roads of a township for carrying on his or its business of hauling mill logs or timber or other heavy material with log wagons, log carts, or other heavy vehicles, shall first obtain a license for this purpose from the board of supervisiors of the township in which he or they may desire to operate and make use of the roads, by paying an annual license tax of $15 for each wagon or cart or vehicle of the kind above described to be used, which tax shall be paid to the treasurer of the road fund and placed to the credit of the board of supervisors of the township, to be used by the board as other funds for said township. Any person violating this section shall be guilty of a crime and liable to a penalty of $50, to be recovered in an action by the board of supervisors of roads of the township where the offense took place, for the benefit of the road fund of that township," and the Court held the statute constitutional, the only difference between the statute in that case and the one in this being that in one the license was to be paid by any person, corporation, etc., carrying on the business of hauling "logs, timber, or lumber," while in the other it was to be paid by any person, corporation, etc., carrying on the business of hauling "mill logs or timber or *other heavy material.*"

In *Dalton v. Brown, supra,* the following statute was approved: "That any lumber company, corporation, person or persons engaged in the lumber business and desiring to use any of the public roads of any of the townships of Macon County for the purpose of carrying on its or their business of hauling, either by itself or themselves, or by hiring or contracting with other persons, mill logs, lumber, or other heavy material with log wagons, log carts, or other heavy vehicles, (226) shall pay a license or other privilege tax of two (2) cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material so hauled."

Two of the justices dissented from the opinion of the Court in the last case, upon the ground that the statute did not apply to all who hauled logs, heavy material, etc., but only to those who were engaged in the lumber business, and that this was a discrimination not permitted by law. The statute before us is not subject to this objection, as it includes any person, corporation, etc., engaged in the business of hauling logs, etc.

We, therefore, hold that the two cases cited are decisive of this, and that there is

No error.

(227)

STATE v. J. L. ALLEN.

(Filed 16 October, 1912.)

1. Intoxicating Liquors—Indictment—Attempted Sales—Verdict—Judgment.

A charge in an indictment that the defendant did "solicit orders and proposals of purchase, etc," for intoxicating liquors in prohibited territory, if considered as embodying a criminal accusation, can only amount to a charge of attempting to effect unlawful sales, and a conviction may not be had upon the findings of a special verdict that the defendant ordered, without profit, the liquors from beyond the State, as an accommodation to purchasers here, and did not solicit orders from any person or persons.

2. Same—Principal and Agent—Agent of Purchaser.

An agent for an express and railroad company who was paid by his employers a commission upon the receipts at his office was indicted for violating the State prohibition law by a sale of whiskey to a certain designated person, and it is *Held*, that a judgment of not guilty was properly entered upon a special verdict finding that he had ordered the whiskey from dealers beyond the State, as an accommodation for the purchaser here, without profit, or other interest in the transaction, and had received it by express and delivered it to him in the original package.

3. Intoxicating Liquors—Procurement of Sales—Agent of Vendor—Interstate Commerce—Interpretation of Statutes.

The provisions of the Revisal, sec. 3534, that "if any one shall unlawfully procure and deliver whiskey for another he shall be deemed in law the agent of the vendor and be deemed guilty of a misdemeanor," does not apply when the whiskey has been ordered from beyond the State and the transaction is the subject of interstate commerce. It applies to procuring the whiskey by purchase from an illicit dealer in probibited territory here.

4. Intoxicating Liquors—Place of Sale—Interpretation of Statutes—Interstate Commerce.

The provisions of Revisal, sec. 2080, making the place of delivery of intoxicating liquors the place of sale, do not apply when the liquors are ordered from beyond the State and the subject-matter of the transaction is properly regarded as interstate commerce.

5. Intoxicating Liquors—Packages in Bulk—Distribution—Federal Law and Constitution.

When the shipment of intoxicating liquors is the subject of interstate commerce, and each package is addressed to its respective purchaser, the fact that they have been received in a general package and distributed, as directed, does not bring the transaction within the meaning of the Federal statute, known as the Wilson Act, which provides that upon transporting such liquors into a State or territory they shall upon arrival be subject to the laws thereof enacted in the exercise of its police powers, etc.

6. Intoxicating Liquors — Indictment — Verdict — General Verdict — Specific Findings—Judgment.

For a person to be successfully indicted for the unlawful sale of spirituous liquors, it is necessary that there be allegation and proof of specific conduct constituting a breach of the criminal law; and when the indictment charges an attempt to make such unlawful sales, and by a special verdict it is found that the defendant "did order for everybody else who applied to him," excepting the sales specifically charged, a judgment of guilty may not be entered against him.

APPEAL by plaintiff from *Ferguson, J.*, at July Term, 1912, of WAKE.

Criminal action. The bill of indictment was as follows:

"The jurors for the State upon their oath present that J. L. (228) Allen, late of the county of Wake, on 15 May, in the year of our Lord 1912, with force and arms, at and in the county aforesaid, did unlawfully and willfully sell for gain one-half gallon intoxicating liquor (corn whiskey) to B. M. Green, he, the said J. L. Allen, not then and there having a license to sell intoxicating liquor, against the form of the statute in such case made and provided and against the peace and dignity of the State. And the jurors for the State, upon their oath, do further present: that said J. L. Allen, of the county and State aforesaid, on 15 May, in the year of our Lord 1912, with force and arms at and in the county aforesaid, did unlawfully and willfully, for himself and as agent for persons, firms, and corporations, whose names are to the jurors unknown, solicit orders and proposals of purchase by the jug and bottle of intoxicating liquors of and from one B. M. Green, and other persons whose names are to the jurors unknown, against the form of the statute in such case made and provided, against the peace and dignity of the State."

The jury rendered the following special verdict: "The defendant J. L. Allen resides at Wake Forest, in said county, and has been for many years the agent of the Seaboard road and of the Southern Express Company at that place. On 17 June, 1912, between 2 and 3 o'clock in the evening, one B. M. Green applied to the defendant at Wake Forest to have shipped to him a half-gallon of corn whiskey, from Petersburg, in the State of Virginia, the cost of the whiskey being $1.05. The defendant Allen at Wake Forest received the money, $1.05, and sent it to the said firm in Petersburg, State of Virginia. The defendant did not know the price of the whiskey, but left it to the firm in Petersburg, Va., to send such corn whiskey as they could for the money inclosed. That the said money was sent by mail that evening, leaving Wake Forest about 5:45 p. m., 17 June, 1912, and the whiskey came by express over the Seaboard Air Line Railway the next day, reaching Wake Forest between 3 and 4 o'clock p. m. That the said half-gallon of corn whiskey came

along with whiskey shipped to other parties, to whom it was addressed, and bore the name of B. M. Green on the package. That about 4:30
(229) o'clock on the evening of 18 June, 1912, the said Green came to the express office and asked for his whiskey. The defendant Allen handed him the original package of whiskey, upon which was written the name B. M. Green. That the said whiskey came along with other packages addressed to other persons, and also bearing the name of B. M. Green, in order to save the express charges. That the said Allen had previous to this, on a number of occasions, sent money for whiskey for various persons, at their request, to different firm at Petersburg, Richmond, and Norfolk, in the State of Virginia. That the said Allen was not the agent of any of the said firms, and has no interest whatever in the transaction, but his purpose was merely to accommodate the said persons, and he received nothing whatsoever from the said persons or the said firms as compensation in these transactions. That he, the said Allen, did not solicit orders for whiskey from any *person* or *persons,* and did not order any whiskey for any minor or any of the students at Wake Forest; that he did order for everybody *else* who applied to him. That the said defendant Allen's compensation as express agent at Wake Forest was 10 per cent on the net receipts at that point, on all business of every character done at Wake Forest, and he received no other compensation from the said express company other than the 10 per cent upon the said receipts from all sources on the said express company's earnings at Wake Forest. That the shipments of whiskey to Wake Forest by express was increased only in proportion to the increase of other express freight within the last few years. That there is a large quantity of whiskey shipped by freight, and also by express, other than that shipped to the persons aforesaid. That the said whiskey is shipped to Wake Forest addressed to persons living at various distances from Wake Forest and in other townships and counties. It is shipped in such quantities to Wake Forest because of the fact that the persons doing their trading at Wake Forest find it more convenient for them to have it shipped there. That the said whiskey was in the original package in which it was shipped, and was sealed up when received and was delivered to the said Green in the same condition in which it was received,
(230) and was not at any time intermingled with other property in the said State. That since the first of the year 1912 shipments by express have averaged about $60 per month, shipped in the manner aforesaid from the points aforesaid in the State of Virginia, on account of the money sent as aforesaid in the manner aforesaid by the defendant, and for the month of June, 1912, the amount may have reached $100. The jury for their special verdict say:

"We find the foregoing facts; and if on the said facts the court is of opinion that the defendant is guilty, then we find the defendant guilty as charged in the bill; and if the court is of the opinion that the defendant is not guilty upon such findings, then we find the defendant not guilty."

Upon the foregoing special verdict the court is of the opinion that the defendant is not guilty. And thereupon the jury for their verdict say that the defendant, the said J. L. Allen, is not guilty.

Motion for new trial and to set aside verdict overruled, and State excepted. From judgment discharging defendant, State again excepted and appealed.

Attorney-General, Assistant Attorney-General T. H. Calvert, and Jones & Bailey for State.

A. Jones & Son and Douglass, Lyon & Douglass for defendant.

HOKE, J. The defendant was tried on a bill of indictment containing two counts: (1) an unlawful sale of whiskey to one B. M. Green "at or in said county"; (2) that he "unlawfully, for himself and as agent for persons, firms, and corporations whose names are to the jurors unknown, did solicit orders and proposals to purchase by the jug and bottle of intoxicating liquors from one B. M. Green and other persons whose names are to the jurors unknown," etc.

The second count in the bill, if it be considered as embodying a criminal accusation, can only amount to a charge of attempting to effect an unlawful sale to B. M. Green or other persons to the jurors unknown, by unlawfully, for himself and as agent for persons, firms, and corporations, soliciting orders for whiskey.

Apart from any legal considerations which might arise as to the substance of this charge, the prosecution must fail here, for the very sufficient reason that the basic facts upon which it is made to rest (231) are expressly repudiated by the special findings of the jury, as follows: "That the said Allen was not the agent of any of the said firms, and has no interest whatsoever in the transaction, but his purpose was merely to accommodate the said persons, and he received nothing whatsoever from the said persons or the said firms as compensation in these transactions. That he, the said Allen, *did* not *solicit orders* for *whiskey* from any *person or persons*, and did not order any whiskey for any minor or any of the students at Wake Forest; that he did order for everybody else who applied to him."

The question then recurs as to the guilt or innocence of defendant under the first count in the bill, that of making an unlawful sale to B. M. Green at or in said county, etc. On this charge, the special ver-

dict, by correct interpretation, finds that defendant, who was depot and express agent at Wake Forest, N. C., at the request of B. M. Green, received from him $1.05 and sent same with an order for whiskey for said Green to that amount to a firm in Petersburg, Va. That the whiskey came the next day by express over Seaboard Railroad in a package containing half-gallon corn whiskey, addressed to said Green, and was delivered to him as purchaser. That defendant received no profit for the transaction and acted throughout as agent of the buyer and for his accommodation.

There is a statute in North Carolina (Revisal, sec. 3534) which provides that "if any one shall unlawfully procure and deliver whiskey for another he shall be deemed in law the agent of the vendor and be guilty of a misdemeanor." Interpreting the act in *S. v. Burchfield,* 149 N. C., 537, it was held that the same applied to the case of procuring whiskey by purchase from an illicit dealer in prohibited territory and delivering it to another, *Associate Justice Walker* in the opinion saying: "The meaning of the section is not very aptly expressed, but the Legislature has sufficiently declared the intention to make it criminal for any person to procure liquor from an illicit dealer by purchase and deliver to another when both the purchase and delivery are made in a place where the sale of liquor is prohibited by law." And in another (232) case, at the same term, *S. v. Whisenant,* 149 N. C., 515, referring to this and other sections of the prohibition statutes, it was held:

1. Revisal, sec. 3534, making it criminal for one to procure whiskey for another by reason of an unlawful sale, has no application when the sale is not illegal or when our State legislation on the subject cannot apply to and affect the transaction by reason of the commerce clause in the Federal Constitution.

2. When one acts entirely as the agent of the buyer in ordering whiskey to be sent from another State, and has no interest in the whiskey, and has no part in the sale as vendor, or his agent or employee, he is not indictable under Revisal, 3534.

3. A sale of whiskey consummated in another State by order of one as agent for the buyer, sent from a place in the State where the sale is prohibited, is not indictable under the commerce clause of the Federal Constitution, and State legislation cannot affect the transaction, in respect to its criminality, until and after there had been a delivery within the State.

In that case the facts were, as ascertained and acted on by the jury, that the prosecuting witness had given defendant the money and requested him to make an order for some whiskey with one that defendant was sending for himself to a wholesale grocery house at Knoxville, Tenn.

The money and order were sent as requested and the whiskey delivered to the witness as in its receipt by defendant. In our opinion, this authority is decisive and fully supports the ruling of his Honor on the facts as presented in the special verdict.

It was contended for the State that the commerce clause of the Federal Constitution should not afford protection in this case, for the reason that there were other parcels of whiskey for other persons in the same general package which contained that for Green, and that defendant made himself guilty in delivering the different parcels to the parties, Green among others, to whom they were respectively addressed. This position was presented and rejected by this Court in *S. v. Trotman,* 142 N. C., 662, a ruling made in deference to a decision of the Supreme Court of the United States, the final arbiter on these questions, in *Caldwell v. North Carolina,* 187 U. S., p. 622, and in which it (233) was held: "An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce." The facts and the decision in the Trotman case referred to, appearing in the headnote as follows: "In an indictment for selling patent medicines, etc., without license, contrary to Revisal, secs. 5150-1, where the jury by a special verdict found that certain citizens of this State gave orders for the medicines on a drug company in another State, which were forwarded to, received, and accepted by the company in that State, and the goods shipped from that State to the defendant, the drug company's agent in this State; that each package was wrapped in a separate parcel with the name of the purchaser marked thereon and then packed in one crate and shipped to defendant, who distributed same in the original form to the purchaser: *Held*, that the defendant was not guilty, as he was at the time engaged in interstate commerce." The principle recognized and applied in these cases is in no wise affected by the Federal statute, sometimes called the Wilson Act, which provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Chapter

728, 26 Statute L., 313, 3 Fed. Statutes, Annotated, p. 853. That legislation was enacted to minimize or remove the effects of a decision of the Supreme Court of the United States theretofore recently rendered (*Leisy v. Harden,* 135 U. S., 100) to the effect that, under the commerce clause of the Federal Constitution, a vendor could not only
(234) import whiskey from one State to another, notwithstanding the prohibition laws of the latter State, but could sell it there in the original package. The statute has been declared a constitutional enactment, with the limitation that it does not operate to restrain or affect a continuous shipment of whiskey from a vendor in one State to a vendee in another and there delivered to such vendee in the original package, this being the case now presented for consideration. *Wilkinson v. Rharer,* 140 U. S., 345; *Rhodes v. Iowa,* 170 U. S., 413.

We were referred also to the North Carolina statute, Revisal, sec. 2080, by which in the case of intoxicating liquors the place of delivery is made the place of sale. The validity of this statute has been approved by this Court as to sales within the State. *S. v. Herring,* 145 N. C., 418; *S. v. Patterson,* 134 N. C., 612. But this statute may not be held to apply to a sale fully consummated in another State and where the subject-matter of the transaction is properly regarded as interstate commerce, and, as such, protected from interfering State regulations. On the facts, this sale was consummated in the State of Virginia, and the shipment, as we have just shown, must be considered and dealt with as interstate commerce till delivery in the original package to the purchaser. *Caldwell v. State, supra; S. v. Trotman, supra; Rhodes v. Iowa, supra.*

It was further urged for the State that, while the facts referred to might, when standing alone, have the effect of exculpating defendant, there are other facts embodied in the special verdict tending to establish that defendant was engaged generally in the unlawful business of procuring whiskey for others in prohibited territory, and this sale to Green should be held criminal as an instance and incident of the general unlawful business, especially under the finding which says, "That he did not solicit orders from any one nor order for any minor or any student of Wake Forest College, but did order for everybody else who applied to him." This position assumes the very question which is in debate, and proceeds upon a theory not contained in either count of the bill of indictment and which could not be made the basis of a valid indictment.

A citizen cannot be successfully prosecuted under a charge of
(235) engaging generally in the unlawful business of selling whiskey. For various and altogether sufficient reasons, in a charge of that character, there must be allegation and proof of specific conduct constituting a breach of the criminal law. *S. v. Tisdale,* 145 N. C., 422. A

requirement guaranteed by our Constitution and necessary in common fairness to enable a defendant to properly prepare his defense and to protect him from a second prosecution on the same state of facts. Accordingly, the bill of indictment, in this case, as stated, charges, on the first count, an unlawful sale to B. M. Green at and in Wake County; second, an unlawful attempt to make such a sale by soliciting purchases, on his part, in behalf of persons, firms, and corporations, to jurors unknown.

Unless guilty by reason of the conduct referred to and described in one or the other of these counts, there has been no crime against him either charged or proved, and for the reasons stated neither charge can be successfully maintained on the facts established by the verdict.

No error.

Cited: S. v. Wilkerson, 164 N. C., 443; *S. v. Cardwell,* 166 N. C., 312, 313.

STATE v. WILL LOGAN.

(Filed 30 October, 1912.)

1. Murder — Instructions — "Deliberation or Premeditation" — Charge Construed as a Whole—Appeal and Error.

Upon a trial for murder, a charge of the court, under pertinent evidence, to find the prisoner guilty of murder in the first degree, if the jury were satisfied beyond a reasonable doubt that the prisoner fired the fatal shot with "premeditation or deliberation" is not held for error because of the use of the disjunctive "or" for the conjunctive "and," it appearing that the use of that word was an inadvertence; and it further appearing from the charge, construed as a whole, that the court charged that the shooting should have been done with "deliberation and premeditation" in order to convict him.

2. Same—Interpretation of Statutes—Harmless Error.

Under our Statute, Revisal, sec. 3631, a murder committed in the perpetration of a robbery, which the evidence in this case discloses, is murder in the first degree, and an instruction in such instances which uses the disjunctive "or" for the conjunctive "and," as, if the jury should be satisfied beyond a reasonable doubt that the prisoner killed the deceased with "premeditation or deliberation," to find him guilty of murder in the first degree, is immaterial, and is not held for reversible error.

APPEAL by defendant from *Whedbee, J.,* at January Term, (236) 1912, of ANSON.

Indictment for murder. The prisoner was convicted of murder in the first degree of one Fred Hendrixson, and from the sentence of death appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Lockhart & Dunlap for defendant.

BROWN, J. The record presents four assignments of error, three relating to the evidence and one to the charge of the court. After giving each of them the consideration which the importance of this case demands, we conclude that they are without merit, and cannot be sustained.

We deem it necessary to discuss only the assignment relating to the following charge, viz.: "If you find that the defendant fired the fatal shot, then you inquire as to whether or not it was done with premeditation or deliberation, as I have defined to you; and if you are satisfied of the fact beyond a reasonable doubt, then you would return a verdict of murder in the first degree."

It is clear that the use of the disjunctive "or" instead of the conjunctive "and" was an inadvertence upon the part of the able judge who presided at this trial. *S. v. Teachey*, 138 N. C., 589. But we are of opinion, upon examination of the entire charge, that the jury could not have been misled by it.

His Honor corrected the error completely in the closing words of the charge. After instructing the jury carefully and correctly as to a reasonable doubt, he said: "If you find he did shoot him, then ask yourself the question, Does this evidence satisfy you it was done with premeditation *and* deliberation, or does it satisfy you beyond a reasonable doubt that it was done in attempt to perpetrate or in perpetration of
(237) a robbery? If so, you will return a verdict of guilty of murder in the first degree."

Had his Honor failed to correct the error, we would not regard it as material in this particular case.

The statute, Revisal, 3631, declares a murder committed in the perpetration of, or in the attempt to perpetrate a robbery, to be murder in the first degree.

His Honor might well have omitted from his charge all reference to "premeditation and deliberation," for the *entire evidence* in this record shows that the prisoner slew the deceased while perpetrating a robbery upon his person. All the evidence was introduced by the State, the defendant offering none. To illustrate the circumstances attending the homicide, we quote a part of the evidence. Edward Klobe testified:

"I came out and told Charley that I had been robbed. Will was then at his feet. After Charley and Logan came, Logan put his pistol at his

breast and said, 'Give me your money!' He said in English, 'Look out money.' After Logan had his hands up and searched him and got $1.50. After he finished with him, he started to go through his pockets again. After he finished Normy, he began with Hendrixson, and Hendrixson said he had no money in his pockets. While he was trying to hold up Hendrixson, Klobe started out the door and Hendrixson put his hands on Klobe's shoulders and Logan took hold of Hendrixson with one hand and held the pistol in the other. As soon as he got out of the door, Hendrixson let go of Klobe and Klobe ran a short distance, and the first shot was fired, and Hendrixson called for the boys to come back and help him. When Hendrixson called for help they were in the road, and then the second shot was fired and Klobe ran to the deceased and said he was dead, and Normy ran to him and said he was dead."

The witness Charles Normy testified: "When they came in the tent, Will Logan began to go through Klobe; then he started to search me, and then he went and searched deceased. Logan had pistol in his hand and searched pocket. When he started to search Hendrixson, Klobe went out and Hendrixson put his hand on Klobe's shoulders. Will Logan caught deceased in collar and had pistol in other hand; when they got just outside of tent Will Logan fired the first shot; (238) they were in arm's length, Klobe was behind. Logan said nothing. The deceased was trying to get loose from him. Deceased hollered, 'Come, help me!' and the second shot came and Hendrixson fell. Will Logan fired the second shot. When it fired, Logan and Hendrixson were 15 or 20 feet apart."

In any view of the evidence, if it is to be believed, the prisoner shot and slew the deceased in an endeavor to rob him, and that constitutes murder in the first degree.

No error.

STATE v. THOMPSON.

(Filed 28 October, 1912.)

1. Murder—Circumstantial Evidence—Footprints—Opinion Upon the Facts.

Upon trial for murder in the first degree for the shooting of deceased at night through a window of his dwelling, there was evidence tending to show bad blood existed between the prisoner and deceased, with threats by the former on the life of the latter, and other circumstantial evidence tending to establish the guilt of the prisoner: *Held*, that testimony of a witness was competent that there were footprints at the time of the shooting leading from the window through which the fatal shot was fired to the dwelling of the prisoner, corresponding with the prisoner's shoes;

that upon placing the prisoner in these footprints, they corresponded with his shoes, and placing him unwillingly at the window with a leveled gun, it was ascertained that he could readily have fired and killed the deceased at the place the latter had been shot.

2. Same—Duress—Self-incrimination—Constitutional Law.

Upon trial for murder in the first degree, when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place his foot in footprints leading from the place of the murder to his own dwelling, or to place himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, the position of the deceased and point from which the fatal shot was fired being in evidence, and is not objectionable under Article I, sec. 11, of the Constitution, which declares that every man has a right "not to be compelled to give evidence against himself."

(239) APPEAL by defendant from *Whedbee, J.*, at March Term, 1912, of UNION.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General for the State.
Redwine & Sikes for prisoner.

CLARK, C. J. The prisoner was convicted of murder, in the first degree, of one Gus Alsobrooks. The deceased was shot on the night of 8 March, 1912, while asleep in a chair a few feet from a window, by some one standing outside. Quentin, son of deceased, testified that he was sleeping in the bed in the same room; that the dogs began barking outside; that he got up, went to his father and tried to wake him; that while he was standing behind the chair the gun was fired by some one outside He said that the shot struck the deceased in his eyes and also hit the witness. Another son testified that he was in bed when his father was shot, and when he got up he found Quentin lying on the floor. There was also evidence that preceding the killing there had been bad feeling between the deceased and the prisoner and quarrels and fights between their children; that shortly before, as the deceased was passing the house of the prisoner, he was shot at from ambush by some one. The deceased took out a warrant against the son of the prisoner for such shooting, and the prisoner threatened the deceased that if he did not withdraw the warrant he would not be living when it came to trial.

There was evidence that it had been raining the night of the murder; that tracks were found 3½ or 4 feet from the window, and several persons testified to following the tracks in a round-about direction to within 50 feet of the prisoner's home, and that the shoes worn by him fitted in the tracks. There was a hard path leading to the house from the

place where the print of the tracks ceased. Other tracks a little distance from the prisoner's house, which he admitted to be his, looked like the same tracks which had been followed by the witness. It was also in evidence that at one place it appeared as if the person making (240) the tracks had fallen and there was a print of his knee on the ground. The prisoner admitted that he had worn overalls that day, and when the house was searched overalls were found with dried mud on the knee. A shell was found close to the tracks which the witnesses had followed to the prisoner's house at about 200 or 300 yards from the house of the deceased.

Clifford Fowler, witness for the State, testified in regard to the tracks found outside the window and to following them to the house of the prisoner. He stated that when the coroner's jury was at the house of the deceased, the prisoner went to the house with his gun and was put in the tracks, and that the prisoner was of sufficient height to have fired the gun. He was then asked, "Tell how the prisoner acted in taking these measurements," to which witness answered: "I like not to have got him up there. He didn't want to go there at all."

"Q. What did he do? A. Some one handed me a gun. I took him around to the window and handed him the gun. I said, 'Sam, get up there; I want to see if you are high enough to do the shooting.' I said, 'You must take the gun.' He did, and stepped up and put the gun over his shoulder. I said, 'Put it to the shoulder just like you were going to shoot it.' He fetched the gun up and did like this [witness crouches down]. He put his feet within 3 or 4 inches of the track. I said, 'Measure it and put your gun up there.' The gun looked like it might have been that distance, about 7 inches from the window.

"Q. State to the jury, after he put it on his shoulder and pointed, if you got behind and sighted to see where it sighted with reference to where deceased was sitting. A. It was on a line, and the shot was on the line."

To the foregoing questions and answers the prisoner entered two objections and excepted. The objections here taken present the question whether the prisoner has been deprived of his privilege against self-incrimination, guaranteed by Article I, sec. 11, of the Constitution, which declares that every man has a right "not to be compelled to give evidence against himself."

It has been frequently held proper, and has become a common (241) prace, to compare tracks found at a place where a crime has been committed with the shoes worn by a suspected person or one under arrest. That was done in this case, and evidence was admitted of the conclusions of the witnesses. Such evidence is not considered as making

a person furnish evidence against himself. It is dependent upon physical facts and conditions, and does not depend upon confessions, admissions, or statements of the prisoner.

The testimony of the constable, giving the result of the observation of the prisoner standing at the window and pointing his gun in the direction in which it is known that the deceased was at the time he was shot, is a physical fact or condition as to which he could testify as in the case of the comparison of shoes and footprints. Wigmore on Ev., secs. 2263, 2265.

In *S. v. Graham,* 74 N. C., 646, it was held that if a prisoner under arrest is compelled by the officer having him in charge to put his shoe in a track found in a field for the purpose of comparison, the result of that comparison is admissible on the trial. *Reade, J.,* said: "Confessions made under duress or under the influence of hope or fear are excluded, because experience shows that they may be influenced by such motives. But no fear or hope of the prisoner could produce a resemblance of his tracks to that found in the cornfield; nor make the shoe fit the track; nor could the fact that the officer made the prisoner put his foot in the track affect the resemblance," and cited from Best on Ev., 283, the cases where a person under duress confesses to have stolen goods and deposited them in a certain place: although the confession of the theft will be rejected, yet the evidence that he stated where the goods were deposited will be received, if they are found there. He cites the numerous authorities that an officer who arrests a prisoner has a right to take from him any property which he has about him which is connected with the charge or which may be required as evidence, such as, for instance, a broken knife corresponding with the broken blade left in the window, which had been opened by a burglar, or a fragment of paper corresponding with the wadding of a gun, or counterfeit money found on the prisoner's person, which tends to show the scienter, or a pistol which showed that it had been recently discharged. He adds that if the prisoner had refused to put his foot in the track for the com-
(242) parison, his refusal to do so would have been competent evidence. He cites numerous authorities.

S. v. Graham has been cited with approval. *S. v. Lindsay,* 78 N. C., 501; *S. v. Mallet,* 125 N. C., 725 (citing additional authorities) *S. v. Hunter,* 143 N. C., 610.

The question is not whether the prisoner could have been compelled to take the position and point the gun, or put his feet in the tracks, but the result of such pointing being in the line or direction where the deceased lay, was not duress, and was a matter of evidence to go to the jury, just as whether the shoes fitted the tracks or not. If the prisoner

had declined to take the position as requested and point the gun, such refusal also would not have been due to duress, and, as *Reade, J.*, said in *S. v. Graham,* would have been competent evidence for the jury to consider. Nor do we think that the prisoner's contention was valid, that when the witness stated that the prisoner "Didn't want to go there at all," this was merely an expression of opinion. It was the statement of his conduct and appearance on that occasion, as to which the prisoner could have cross-examined the witness. *Sherrell v. Telegraph Co.,* 117 N. C., 363; Lawson Exp. Test., Rule 64; *Tobin v. Shaw,* 71 Am. Dec., 555.

The above are the only exceptions presented in the prisoner's brief, and the others are deemed to be waived. Rule 34, 140 N. C. However, we have examined them, and agree that they do not require discussion.

No error.

Cited: *S. v. Lowry,* 170 N. C., 733.

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STATE v. W. P. SNIPES.

(Filed 7 November, 1912.)

1. Cities and Towns—Police Powers—Taxation—Restaurants—Statutes—Ordinances—Constitutional Law.

A legislative charter granted to an incorporated town authority to tax restaurants, etc., to define and abate nuisances, etc., and an ordinance passed in pursuance thereof, applying to all alike, requiring that keepers of restaurants, etc., should be licensed, and that persons desiring to engage in such business shall, before doing so, apply to the board of commissioners of the city, stating the place, etc., and pay for the privilege the sum of $25, are constitutional and valid, whether the regulations are regarded as within the police powers of the town or within its taxing power.

2. Same—Mandamus—Payment Under Protest—Procedure.

One applying to the proper authorities of an incorporated town for the privilege to conduct a restaurant at a certain place therein, in accordance with a valid city ordinance requiring it, and providing for the payment of a certain sum for the privilege desired, may not test the refusal of the municipal authorities to grant the request, by acting in violation of their decision, the proper remedy being by mandamus; or, where it may be done, he should pay the tax under protest and sue for its recovery under the provisions of Revisal, sec. 2855.

STATE *v.* SNIPES.

APPEAL by defendant from *Whedbee, J.*, at the September Term, 1912, of GUILFORD.

Criminal action for willful violation of city ordinance, heard on appeal from municipal court city of Greensboro. The jury rendered a special verdict, and, upon the facts therein established, the court being of opinion that defendant was guilty, adjudged defendant guilty, imposed a fine of $100, and defendant excepted and appealed.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE HOKE.

Attorney-General, Assistant Attorney-General T. H. Calvert, and A. Wayland Cooke for the State.

Thomas S. Beall for defendant.

HOKE, J. The charter of the city of Greensboro, Private Laws 1911, p. 1, confers upon the municipality the power to impose a license tax upon restaurants, etc.; to define and abate nuisances, to license, tax, and regulate trades, occupations, and professions; to pass and enforce such ordinances, rules and regulations as may be necessary for the preservation of the health, convenience, good order, better government, and general welfare of the citizens, not inconsistent with the statute and Constitution of the State, etc. On the hearing, it was made to appear
that an existent ordinance of the city required that the keepers
(244) of restaurants, etc., should be licensed, and that persons desiring
to engage in such business shall, before doing so, apply to the board of commissioners of the city, stating the place, etc., and paying for the privilege the sum of $25, etc.; that defendant had duly applied in writing to the commissioners for the privilege of conducting such a business, accompanied by a petition of certain citizens, and "that the board of commissioners of the city of Greensboro declined to issue the license as applied for, giving as their reason therefor that the place sought to be occupied, in their opinion, was not a suitable and proper place in which to conduct a restaurant; that thereafter, and after the refusal of the commissioners of the city of Greensboro to grant the license applied therefor, the defendant continued to occupy the said place and used it as a restaurant, having theretofore conducted a restaurant in the same building under a permit from the city, which permit had expired some time theretofore; that the warrant in this cause was then sworn out; that the defendant was tried and convicted before the recorder in Greensboro, and appealed to this court from said judgment."

Additional facts were found in the verdict as to the exact placing of the proposed business, tending to show that there was no good reason for denying the defendant's application on the ground of locality.

Upon these, the controlling facts found by the special verdict, we are of opinion that the defendant has been properly convicted. The statute is constitutional, conferring ample power, and the ordinance, applying to all alike and providing for the privilege on payment of a reasonable fee, whether regarded as a police regulation or as an exercise of the taxing power, must be held valid. *S. v. Perry*, 157 N. C., 661; *S. v. Powell*, 100 N. C., 525; *S. v. Bean*, 91 N. C., 554; *S. v. Cohen*, 84 N. C., 771; *In re Wilkesbarre*, 103 Fed., 620. In such case, defendant, who considers that he has been unjustly treated, is not permitted to test the propriety of the commissioners' action by disobeying the ordinance. He should have applied for a mandamus for the relief, as indicated in *Barnes v. Commissioners*, 135 N. C., 27; *R. R. v. Commissioners*, 148 N. C., at p. 225, or, more simply, if the facts permitted, he should pay the moderate tax required under protest (245) and sue to recover the same as provided by the statute, Revisal, sec. 2855. *Western Union v. Town of Winnsboro*, 71 S. C., 231; *S. v. Jamieson*, 23 Mo., 30. In the case of *S. v. Moore*, 113 N. C., 697, to which we were referred by counsel, the ordinance itself was declared invalid; and in *Yick Wo v. Hopkins*, 118 U. S., 356, an authority also relied upon, not only was the ordinance held invalid as an attempt to confer arbitrary power on an administrative board, but in its practical application there was evidence of "arbitrary and unjust discrimination, founded on differences of race, between persons otherwise similar situated." But no such conditions are presented here, where the ordinance is valid and there is no claim or finding of discrimination or bad faith. In such case the plaintiff should apply for a mandamus or, when allowed this privilege, should test the action of the city commissioners by paying the $25 demanded, after protest, and suing to recover the same, as allowed by the general statute. As said by *Connor, J.*, in *R. R. v. Commissioners, supra*, recommending a proceeding by mandamus in certain cases: "We call attention to this for the purpose of suggesting that it is proper to resort to the most efficient remedy which interferes in the smallest degree with the collection of the public revenue."

There is no error, and the judgment of the Superior Court must be Affirmed.

Cited: *S. v. Sermons*, 169 N. C., 288.

STATE v. J. E. SAVAGE.

(Filed 13 November, 1912.)

Verdict—Judgments—Motions in Arrest—Interpretation of Statutes.

Upon a verdict finding that the defendant was "guilty of an attempt to commit the crime charged in the bill of indictment," the offense being that prohibited by Revisal, sec. 3349, the judgment upon the verdict may not be arrested on defendant's motion. Revisal, 3269.

APPEAL by defendant from *O. H. Allen,* J., at July Term, 1912, of FORSYTH.

The defendant was charged in the indictment with the viola-
(246) tion of section 3349 of the Revisal, which denounces the crime against nature, and the jury returned as their verdict: "Guilty of an attempt to commit the crime charged in the bill of indictment."

Upon this verdict, the defendant was sentenced to four months in jail and assigned to work on the public roads.

The defendant moved in arrest of judgment, which motion was overruled, and defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

H. O. Sapp and Jones & Patterson for defendant.

PER CURIAM. The judgment, upon the verdict of the jury, is fully authorized by Revisal, sec. 3269, which reads as follows:

"Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit a less degree of the same crime."

This statute was discussed in *S. v. Brown,* 113 N. C., 646, and construed in accordance with the ruling of his Honor.

No error.

(247)

STATE EX REL. HENRY E. SHAW, SOLICITOR, v. EMILY BRIDGERS ET AL. AND SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE.

(Filed 20 December, 1912.)

1. **Taxation—Inheritance Tax—Privilege Tax—Interpretation of Statutes—Constitutional Law.**

The inheritance tax laws of 1911, from sections 6 to 21, inclusive, seem to be an exact reproduction of those of 1907, and should there be a difference, the Laws of 1907 will control as to the rate and amount of tax, and those of 1911 as to the method of appraisement and collection, the same being constitutional and valid, as an excise and privilege tax on the transmission of property, and not to be regarded as a tax on the property itself.

2. **Taxation—Inheritance Tax—Suits, by Whom Brought.**

Suits for the collection of the inheritance tax, under the provisions of the statute, may be brought at the instance of the clerk of the Superior Court for the proper county or by the solicitor of the district; and in certain instances, collection of the tax under the usual method by distress by the sheriff or tax collector is authorized.

3. **Taxation—Inheritance Tax—Clerks of Court—Appraisements.**

Under the provisions of section 15 of the inheritance tax laws of 1911, "it shall be the duty of the appraiser (the clerk of the Superior Court) as often and whenever occasion may require, to make a fair and conscionable appraisement" of the estates subject to the tax, with a further duty to assess and fix the cash value of all annuities and life estates, growing out of such estates, upon which the inheritance tax shall be immediately payable out of the estate.

4. **Taxation—Inheritance Tax—Property, When Valued—Tax, When Payable.**

Under the provisions of the inheritance tax laws of 1911, while the tax may be made a personal charge in the case of vested interests, the same is also payable out of the estate, or the portion of it subject to the duty; and for the purposes of estimating the amount of the tax, the property must be valued at the time of the death of the tesator or inestate, and it is assessable or payable at that time or as soon thereafter as the proper and orderly administration of the estate permits, and in any event within two years of such death whenever it is practicable to appraise the property by any of the recognized methods and to ascertain the amount of the tax due.

5. **Taxation—Inheritance Tax—Valuation of Property—Contingencies—Collection of Tax.**

Whenever the amount of the inheritance tax is not practically ascertainable by reason of contingencies affecting the value of the estate subject to the same, or by reason of changes in the succession to holders subject to different rates, or where it is sought to make a contingent legatee subject to a personal charge for the tax before he has come into

the enjoyment of the estate, or where, by reason of the contingency, he may never become the owner, the imposition and collection of the tax must be postponed until the amount of the tax in the one case, or the person who may be charged with the same in the other, can be properly determined.

6. Taxation—Inheritance Tax—Who Taxable — Contingencies — Cestui Que Trusts—Interpretation of Statutes—Executors and Administrators—Interest.

The inheritance tax is imposed on the transmission of the title to "any person or persons or to bodies corporate or politic in trust or otherwise," and on the question of confining the effect of contingencies to those which render the ascertainment of the tax presently impracticable or impossible, the *cestui que trust* is only referred to for the purpose of fixing the rate of taxation which the executor is to retain when the bequest is of money or is specific and a sale is necessary in order to obtain money to pay the tax, and said tax draws interest after two years from the death of the testator or intestate, and is a lien on all the propery subject thereto.

7. Taxation—Inheritance Tax—Vested Interests—Tax, When Payable—Apportionment—Courts—Equity.

While life estates are vested, they are to be appraised by the clerk of the court, and the inheritance tax is payable immediately out of the estate, according to such valuation, and, under section 10 of the act, when such or lesser estates are dependent on contingencies, if the legacy is money, the tax is presently payable from the whole amount; and if not money, the same may be "apportioned by order of court or such orders may be made as equity may require."

8. Taxation—Inheritance Tax—Courts—Funds Transferred from Jurisdiction.

Under the inherent powers of the court and section 10 of the inheritance tax act, when the same is applicable, and especially where the fund is directed to be transferred from this jurisdiction, the court can and should make proper orders and decrees to secure the ultimate payment of the tax, either by causing a sufficient amount of the same to be invested within the jurisdiction or by requiring a bond for that purpose, renewable from time to time as the right and justice of the cause may require.

9. Taxation—Inheritance Tax—Trusts and Trustees—Life Estate—Remainders—Appraisement.

Under the inheritance tax laws, Laws 1911, chap. 46, sec. 6 *et seq.*, the exemption of $2,000 obtains as to each legacy, and where a certain fund is bequeathed to a trustee, with income for life payable out of it, remainder over, the legacy is entire; and, when required, the value of the remainder is to be ascertained by appraising the value of the life estate and deducting it from the entire fund bequeathed.

10. Taxation—Inheritance Tax—Monetary Legacy—Strangers—Life Estate—Remainders—Appraisement—Same Rate.

When a monetary legacy is given in trust to pay one the income for life and then the principal to his children and children's children, all

of whom are strangers to the testator, and subject to the same rate of taxation in each case, it is not required to estimate the value of the life estate, but the executor may retain the tax on the entire amount of the legacy in excess of $2,000, the amount of the exemption.

11. Taxation—Inheritance Tax—Children and Grandchildren—Same Rate—Exemption.

Where a certain fund is bequeathed to trustees, the income payable to testator's daughter for life, and at her death to his children surviving and the children of any deceased child, the legacy is entire, and the rate upon all the beneficiaries being the same, the $2,000 exemption shall be deducted and the tax on the excess presently paid.

12. Same—Devise—Intent—In Relation of Child—Same Rate.

Section 6, chapter 46, Laws 1911, imposes a tax of ¾ of 1 per cent on the excess over $2,000 on all legacies to the lineal issue, or lineal ancestor, or brother or sister of the descendant, or where the legatee stood in the relation of child, this to be determined in the first instance by the clerk of the Superior Court; and where there was a bequest in trust for testator's daughters-in-law, who were entirely deserving, and whom the will throughout showed were held by the testator in tender regard, the income subject to the inheritance tax should be imposed at the said rate of ¾ of 1 per cent, this being the rate imposed when one stood in relation of child.

13. Taxation — Inheritance Tax — Trusts and Trustees — Power to Invest — Sale to Pay Tax.

When the will authorized the trustee, if he deemed it best, to sell the property and convert it into money, and receive the proceeds and invest and reinvest this in the manner and as often as he saw fit, the trustee was empowered to dispose of any part of the trust fund to the amount required to pay the inheritance tax.

CLARK, C. J., and WALKER, J., dissent in part.

APPEAL by plaintiff from *Allen, J.*, at January Term, 1912, of NEW HANOVER.

Civil action heard on case agreed. The action was instituted by the State on relation of the solicitor of the district, as provided by the statute, to ascertain and collect amount due as the inheritance tax on the estate of Margaret Bridgers, deceased, who died on 29 August, 1907, making disposition, by will, of considerable estate. Among (250) other legacies was one of $3,500 to Richard W. Hogue, the then rector of St. James Church. The income to be paid him for life and on his death to his wife, Elizabeth, for life, and at her marriage or death the principal and any accrued income to paid equally, *per stirpes*, to the child or children, grandchild or grandchildren, who should be alive at the time of the death or marriage of their mother, etc., none of these parties of kin by blood or marriage to decedent. The will, after

making various bequests of vested interests, the tax on which has been paid, makes disposition of the residuary estate in general terms as follows: "I direct the executrix of my estate, not sooner than twelve months after my death, to divide the rest and residue of my property and estate, real, personal, and mixed, of whatsoever nature and wheresoever the same may be, into as many shares as there may be sons and daughters of mine alive at the time of my death, and sons and daughters of mine, who have predeceased me, leaving a child or children, grandchild or grandchildren, alive at the time of my death, and widows alive at the time of my death of any son who may have predeceased me without leaving any child or children, grandchild or grandchildren, alive at the time of my death, all of which shares I give, devise, and bequeath to the Safe Deposit and Trust Company of Baltimore, Maryland, to be by them held and disposed of upon the following trusts, to wit: If it deem best to sell, convey, and covert into money any part or all of each share, and to receive the proceeds of such sale, to invest alike the same as it deems best; and if it deems best to sell and convey and convert into money any or all of such investments, and to reinvest the proceeds of such sale, to again sell, convey, and convert into money and reinvest when, as often, and in such manner as it sees fit; to receive the income from such share and from all such investments, and after paying out from such income from each share the taxes on such share and the costs of executing the trust *as to such share,* to dispose of the same as follows:"

At the time of her death the testatrix left her surviving, Emily, a daughter, Mary, a daughter, and George, a son, Annie, a daughter-
(251) in-law and widow of a deceased son, and children of this marriage, and Bettie, a daughter-in-law and a widow of another deceased son, and children of this marriage. The will then makes minute and elaborate provision as to each of the five shares into which this residuum was divided pursuant to item 2, a sufficient synopsis of which appears as follows:

First share. To Emily Bridgers.

(1) Income to be paid Emily during life.

(2) At her death, share in fee to children surviving, and children of such as are dead, if any, *per stirpes.*

(3) At her death, if no children or grandchildren, share to be divided into as many shares as she shall have brothers and sisters surviving her, and brothers and sisters who have predeceased her leaving children or grandchildren, or a widow, to be held, etc.

Second share. To Mary Bridgers.

Same as No. 1.

Third share. To Annie (daughter-in-law).

Same as No. 1, except income given to her until marriage, and in

event of marriage, income during her life to be divided between her and her children and grandchildren of Robert, *per stirpes*.

Fourth share. To Bettie (daughter-in-law).

Same as No. 3.

Fifth share. To George Bridgers.

(1) Income to him for life.

(2) At his death leaving a widow, to her until marriage.

(3) At her marriage, income during her life to be divided between her and his children and grandchildren, *per stirpes*.

(4) At her death, as provided in share No. 1, subsections 2, and 3.

(5.) If no widow, as provided in share No. 1, subsections 2 and 3.

That the residuary estate consists entirely of bonds, stocks, and other securities, and the Safe Deposit and Trust Company is a corporation, resident in the city of Baltimore.

On the record the following questions were propounded as being necessary to a determination of the case: (252)

"First. Whether any inheritance tax is now due and payable upon the several shares composing the said residue of the estate, and also upon the bequest of $3,500 to the said Richard W. Hogue, his wife and issue.

"Second. Whether the said legacies are to be valued for the purpose of the inheritance tax as to the date of the death of Mrs. Margaret E. Bridgers, the testatrix; and, if not, as to what date the said value is to be ascertained and estimated.

"Third. If the said inheritance taxes are presently payable, is it the duty of Emily Bridgers, executrix, and has she the power to sell any stock or securities constituting the several shares of the said residue, in order to raise money to pay the said taxes?

"Fourth. Or, shall the said taxes be paid by the Safe Deposit and Trust Company of Baltimore, as trustee, or by the legatees to whom the several shares may be left in trust for their lives; and, if not, in what way and by whom are they to be paid?

"Fifth. Must the several shares into which the said residue is to be divided be separately set apart before the said tax can be levied or paid upon each of the said shares? and

Finally. Whether, under the inheritance tax law, or any of its provisions, the fund, or any part thereof, is liable to the charge of an inheritance tax, and in whose hands?"

Upon these the facts chiefly relevant, there was judgment in part as follows:

"Ordered and adjudged that no inheritance tax upon the said estate is now due and payable other than the inheritance tax which has already

been paid by the executrix upon the legacies or the estate which were directly bequeathed without conditions and limitations, and the court doth find that it is impracticable to ascertain at the present time, and until all of the legacies fall in and become due, the amount or proportion of said inheritance tax which shall be paid or by whom the same shall be paid.

"It is further ordered, adjudged, and decreed, that no inheritance tax shall be paid on the legacies and estates which were bequeathed and devised for life and in remainder until the falling in of said estates, and that the Safe Deposit and Trust Company of Baltimore, Mary-
(253) land, upon the falling in of each of said legacies or estates, shall, at such times as the said legacies or estates in remainder shall fall in and become due, pay such inheritance tax upon the value of the said legacies or estates as they or it existed at the date of the death of the testator and in such amounts and propositions as they or it at that time shall be due and payable, in accordance with the statute in force and effect at the death of the testatrix, Margaret E. Bridgers, having due regard to the number of legatees or beneficiaries, among whom at that time each of the said legacies, or bequests so bequeathed, shall be divided, allowing to each one of said legatees or beneficiaries an exemption of $2,000 upon the total amount of each of said legacies or bequests due to each of said legatees or beneficiaries at the falling in of said legacies or estates.

"And it is further ordered and adjudged that the said executrix, Emily Bridgers, shall be and is herewith permitted and allowed to distribute any and all of the said funds now remaining in her hands and be discharged as executrix of said estate without further charge or responsibility."

From this judgment the solicitor for the State excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Davis & Davis for defendant.

HOKE, J., after stating the case: The statute of this State imposing a tax on inheritances, Laws 1911, ch. 46, secs. 6 to 21, inclusive, seems to be an exact reproduction of that of 1907, the law which prevailed at the time of the death of the testatrix. Should there be a difference which has escaped us, the law of 1907 will control as to the rate and amount of the tax, and the present statute as to the methods of appraisement and collection. Assuming that the statutes are the same, and referring to that portion of the present law more directly relevant, section 6 of the act provides in part as follows:

"From and after the passage of this act, all real and personal property of whatever kind and nature which shall pass by will (254) or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, whether the person or persons dying seized thereof be domiciled within or out of the State, or if the decedent was not a resident of this State at the time of his death, such property or any part thereof within this State, or any interest therein or income therefrom which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, bargainor, donor, or assignor, or intended to take effect in possession or enjoyment after such death, to any person or persons or to bodies corporate or politic, in trust or otherwise, or by reason whereof any person or body corporate or politic shall become beneficially entitled in possession or expectancy to any property or the income thereof, shall be and hereby is made subject to a tax for the benefit of the State, as follows, that is to say: Where the whole amount of the property, real or personal, which shall pass from a decedent to an heir at law, distributee, devisee, or legatee, by will, by the intestate laws of this State, or by deed, grant, sale, or gift made in contemplation of death, shall exceed in value the sum of $2,000, as determined by the appraisal hereinafter provided for, the tax upon the excess shall be as follows:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister of the person who died possessed of such property aforesaid, or where the person to whom such property shall be devised or bequeathed stood in the relation of child to the person who died possessed of such property aforesaid, at the rate of 75 cents for each and every hundred dollars of the clear value of such interest in such property; and this clause shall apply to all cases where the taxes have not been paid by the executor or administrator or other representative of the deceased person. The clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the defendant."

Subsequent clauses of the same sections impose a higher rate where the kinship is more remote, and increase the same in pro- (255) portion to the size of the legacy, the section containing a proviso "that where the property is devised or bequeathed to a trustee for another or others, the *rate* of such inheritance tax to be paid on such devise or bequest shall be determined by the relationship of the *cestui que trust* or *cestuis que trustent* to the testator."

Sections 7 and 8 provide that any legatees, etc., charged with a tax shall only be relieved by payment, and the same shall draw interest after two years from the death of the decedent. Section 9 requires that the

executors shall deduct the tax, at the rate prescribed, before payment, where the legacy, etc., is payable in money, and, in other cases, he must require payment of the tax at the appraised value, before he can be compelled to deliver the legacy; and if the bequest be of a specific legacy or article, he may sell the same or so much thereof as may be necessary, applying the proceeds in the administration of the estate, after paying the amount of the tax to the proper officer, etc.

By section 11, if the legacy is charged upon realty, the heir or devisee, before paying same to the legatee, shall deduct therefrom the amount of the tax and pay same to the executor, and such tax shall remain a charge on said real estate until it is paid; the section closing with the proviso that all taxes imposed by the act shall be a lien on the personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time the tax is due, and shall continue a lien until the same is receipted for by the proper officer of the State.

The act further contains provisions for the appraisement of the property where same is required; constitutes the clerks of Superior Court the agents of the State for the collection of the tax, and authorizes suit to collect the same, either at the instance of such agent or of the solicitor of the district, a provision under which the present action is instituted, and, in certain instances, authorizes collection of the tax under the usual method of distress by the sheriff or tax collector.

(256) Section 15, referring to the question of appraisement, contains, among others, the provision, "and it shall be the duty of the appraiser, as often and whenever occasion may require, to make a fair and conscionable appraisement of such estates," and it shall be his further duty to assess and fix the cash value of all annuities and life estates, growing out of such estates, upon which annuities and life estates the inheritance tax shall be immediately payable *out* of the estate, at the rate of such valuation; and in this connection section 10 of the act provides: "If the legacy subject to said tax be given to any person for life or for a term of years or for any other limited period, upon a condition or contingency, if the same be money, the tax thereon shall be retained upon the whole amount; but if not money, application shall be made to the court having jurisdiction of the accounts of executors and administrators to make apportionment, if the case requires it, of the sum to be paid by such legatees, and for such further order relative thereto as equity shall require."

From a consideration of these provisions of the statute and authoritative decisions interpreting and applying laws of similar import, we regard it as established that the law is constitutional when viewed as an

excise or privilege tax on the transmission of property, and not as a tax on the property itself (*In re Morris Estate,* 138 N. C., 259); that while the tax may be made a personal charge in the case of vested interests, it is also payable out of the estate, or rather the portion of it subject to the duty, and that, for the purpose of estimating the amount of the tax, the property must be valued at the time of the death of the testator or intestate, and that it is assessable and payable at that time or as soon thereafter as the proper and orderly administration of the estate permits, and in any event within two years of such death whenever it is practicable to appraise the property by any of the recognized methods and ascertain the amount of the tax due. That, where it is not practicable to ascertain the amount of the tax, by reason of contingencies affecting the value of the estate subject to the same, or causing changes in the succession to holders subject to different rates, or where it is sought to make a contingent legatee subject to a personal charge for the tax before he has come into the enjoyment of the estate, and when, by reason of the contingency, he may never became the owner: (257) in such case the imposition and collection of the tax must be postponed until the amount of the tax in the one case or the person who may be charged with the other can be properly determined. Referring more particularly to the question of confining the effect of contingencies to those which render the ascertainment of the tax presently impracticably or impossible, it will be observed that, in section 6 of the act, the tax is imposed on the transmission of the title to any "person or persons or to bodies corporate or politic in *trust* or otherwise," and that the *cestui que trust* is only referred to for the purpose of fixing the rate of taxation; that the tax is to be retained by the executor when the bequest is of money, and where the same is specific the legacy or the article may be sold by him in order to obtain the money to pay the tax, and that the tax imposed draws interest after the two years from the death of the testator or intestate and is a lien on all the property subject thereto. And in regard to life estates, where the same are vested, they are to be appraised and the tax is payable immediately out of the estate according to such valuation, and, under section 10 of the act, when such life or lesser estates are dependent on contingencies, if the legacy is money, the tax is presently payable from the whole amount, and if not money, the same may be "apportioned by order of the court, or such further orders may be made as equity may require"; and it may be well further to note that where the assessment and payment of the tax is necessarily postponed, under the inherent powers of the court and under and by the virtue of section 10, when the same is applicable, and especially where the fund is directed to be transferred from this juris-

diction, the court can and should make proper orders and decrees to secure the ultimate payment of the tax, either by causing a sufficient amount of the same to be invested within the jurisdiction or by requiring a bond for that purpose, renewable from time to time, as the right and justice of the case may require. In respect to the exemption, the tax is imposed only on the excess over $2,000 where the "whole amount of the property, real or personal, which shall pass from a decedent to an heir at law, distributee, devisee, or legatee, by will," etc., and on (258) the same or similar phraseology the better considered cases allow the exemption in case of each legacy, and where, as in this case, a fund is bequeathed with income for life and payable out of the same, the legacy is entire and the value of the remainder is ascertained by appraising the value of the life estate, when this may be required by reason of a different rating, and deducting such value from the entire fund bequeathed and subject thereto. 27 A. and E. (2 Ed.), p. 356, where it is said: "Life estates and annuities are to be appraised at their cash value, according to the annuity tables. The value of a remainder is ascertained by deducting the value of the preceding life estate from the value of the whole estate." It would serve no good purpose to pursue or endeavor to explain or apply the manifold and varying decisions of the courts construing laws on this subject, varying chiefly by reason of amendments passed for the purpose and which would, as a rule, be of no aid to a correct conclusion in this jurisdiction.

In our view, the positions as stated will be found in accord with the better considered cases construing statutes similar to or bearing nearer resemblance to our own. *In re Morris, supra; Attorney-General v. Pierce*, 59 N. C., 240; *Knowlton v. Moore*, 178 U. S., 41; *In re Davis Estate*, 167 N. Y., 227; *In re Vanderbilt Estate*, 172 N. Y., 69; *Frank Ayers v. Chicago and C. Trust Co.*, 187 Ill., 42; *Minot v. Winthrop*, 162 Mass., 113; *Dow v. Abbott*, 179 Mass., 238; *S. v. Pabst*, 139 Wis., 561; *Nunnemacher v. State*, 129 Wis., 190; 27 A. and E., "Succession Taxes," p. 337 *et seq.;* 37 Cyc., p. 1574.

Applying these principles to the facts presented: in reference to the legacy to the Rev. Richard W. Hogue, this is a pecuniary legacy in the sum of $3,500, in trust to pay him the income for life, then to his wife for life, and on their death the principal is payable *per stirpes* to his surviving children and grandchildren, etc. Here the fund is entire, and if required, the value of the life interest of the legatee could be readily ascertained. Inasmuch, however, as the life tenant and the remaindermen are all strangers to the decedent and all the interests are subject to the same rate and the tax payable out of the fund there is no occasion to estimate the value of the life estate. The executor, after de-

ducting the sum of $2,000, the exemption allowed by the statute, (259) will retain the tax on the residue at the proper rate and pay the same to the clerk of the Superior Court or other proper officer as the court below may direct.

As to the share bequeathed in trust to pay the interest to Emily Bridgers for life, with remainder to the lineal issue of the decedent: Here the legacy is entire, the rate is the same, all being subject to ¾ of 1 per cent. The $2,000 exemption will be deducted and the tax at the proper rate will be paid to the clerk as aforesaid or as the court, by order, may direct. And the same ruling disposes of the share bequeathed to the daughter Mary, and a like disposition will be made of the share bequeathed to the son George, with remainder over to lineal issue, etc.

As to the share bequeathed in trust for Annie, the widow of R. R. Bridgers, and for Bettie, the widow of Preston L., the said R. R. Bridgers and Preston L. Bridgers being sons of the testatrix, the income was directed to be paid to them for life or widowhood, and if this was subject to a different rate from the other legatees sharing in these portions the payment of the tax would have to be postponed, because an estate for "life or widowhood" is incapable of present valuation, and there would be no practicable way of determining the amount of the life estate on which the higher or differing rate should be paid. Don Passos Inheritance Tax Law, sec. 53.

In our view, however, these legatees should each be considered and dealt with as one standing in the relation of child to the decedent under clause 1, sec. 6, of the statute. This clause imposes a tax of ¾ of 1 per cent on legacies to the lineal issue or lineal ancestor of decedent or to his brother or sister or to "one who stood in relation of child to such decedent," this in case of question to be determined in the first instance by the clerk of the Superior Court. This provision, in our opinion, refers and was intended to refer to the case of widows or widowers, and other cases could be suggested to the decision of the courts and to relieve them, when legatees, from the higher rate imposed on strangers to the blood of the decedent in all cases where they were deserv- (260) ing of this favor. From a perusal of the will, showing the tenderest concern for these legatees, and from their known deserving, these daughters-in-law should be considered as standing in the relation of children and only be subject to the lighter tax imposed on the lineal issue of deceased. From this it follows that the life tenants, the daughters-in-law, and the remaindermen of these shares, who are the lineal issue of the testatrix, are one and all subject to the same tax rate, and the tax, as stated, being presently payable out of the fund, there is no occasion for estimating the value of the life estate. The exemp-

tion of $2,000 will therefore be deducted from each share and the tax of ¾ of 1 per cent on the residue shall be presently paid to the clerk or as the court may decree or direct pursuant to law.

The entire record and statute shows that the trustee should pay these taxes, which are all now due, out of the funds subject to the duty, and is responsible for such payment and is clothed with the right to sell and dispose of such portion of each share as may be necessary for the purpose; and under the extensive powers of conversion and sale conferred on the trustee by the terms of the will, it has the right to sell and dispose of any portion of each fund that it may deem best in order to obtain the money for such purpose, and the receipt of the State officer shall be a valid voucher in a proper accounting and settlement of the trust estate.

For the reason stated, the judgment of the Superior Court will be reversed, and this will be certified, to the end that the five shares into which the residuum is divided shall be valued as if at the death of the testatrix, the exemption of $2,000 deducted from each share and a tax of ¾ of 1 per cent on the residue be paid into court, with costs of proceedings. That the tax on the legacy of the Rev. R. P. Hogue be also paid, first deducting the exemption, at the rate of 5 per cent, as directed by the statute.

Reversed.

CLARK, C. J., concurs, except in one particular. The statute provides: "Where the *whole amount* of the property, real and personal, which shall pass *from the decedent* to an heir at law, etc., shall exceed
(261) in value the sum of $2,000 . . . the tax *upon the excess* shall be as follows:" This contemplates that estates under that amount shall be exempt and that the "excess" above that amount in all estates shall be taxed. The law intends equality in matters of taxation.

The expression, "shall pass from a decedent to an heir at law," etc., does not mean to give as many exemptions as there are shares, but simply that the estate to the extent of $2,000 shall be exempt, on a parity with estates of not more than that value. The word "decedent" is necessarily in the singular, and the word "heir at law," etc., has no reference to the number of such, for the tax is upon the succession and not upon the property after it reaches the hands of the heir at law, devisee, etc. The latter word, therefore, must be treated as a generic term, and embraces the plural. This is required by the evident purport of the statute; and also by the provisions of the law, Revisal, 2831 (1), which requires that in the construction of statutes "Every word importing the singular number only shall extend to and be applied to several persons or things as well as to one person or thing." To hold otherwise is to give the estate

of a decedent who divides his property into 20 shares an exemption of $40,000, whereas if he were to die intestate or should devise his property to one person there would be an exemption of only $2,000. It will give to estates not over $2,000 an exemption of that sum, while it might give to larger estates many times that exemption. Bearing in mind that the whole purport of the law is to tax the estate of the decedent, or rather the transference thereof to devisees and heirs at law, it is the logical meaning of the statute to give only one exemption, and not to consider the amount of the exemption as being multiplied by the number of the devisees or heirs at law and distributees. It is one fund that is being taxed, and there is only one exemption contemplated by the statute.

The very first provision is that if the "*whole* amount of the property, real and personal . . . shall exceed $2,000 . . . the tax on the *excess* shall be as follows": The law is looking upon the estate as one fund, and makes one exemption, taxing the excess at divers rates (262) according to the relationship, near or remote, of the takers. It would be inequitable to do otherwise.

WALKER, J., dissenting in part: I cannot agree that what is called the exemption of $2,000 extends to all the legatees who take after the life estate has expired. In my opinion, that is not in accordance with the words or meaning of the statute. Where its language is clear, there is, of course, no room for construction, but we merely execute the intention thus clearly expressed. The statute is worded in the singular number and provides that the property inherited by an "heir at law or distributee," or given by will to "a devisee or legatee," and "exceeding in value the sum of $2,000," shall be subject to a tax upon the excess, according to the rule prescribed. This can mean but one thing, which is, that each heir, distributee, devisee, or legatee shall not be taxed at all unless his share, whether in land or personalty, and whether inherited or given by will, shall exceed in value $2,000. Take this case as an illustration: We hold, as I understand, that the property, the income of which is given to Miss Emily Bridgers, is to be taxed upon its full value, subject only to an exemption of $2,000, although the testator has specifically willed it to the ulterior takers as devisees or legatees, depending upon the nature of the property. If this is the correct interpretation, then when we come to a case of intestacy, we can deduct the amount of only one exemption from the entire value, for the heirs and distributees will take precisely as the devisees and legatees take in this case, that is, as a class. Again: if we adopt this construction, the law will give an exemption of $2,000 to a devisee or legatee who takes directly under the will of the testator, and deny it to one whom takes mediately, that is,

with the intervention of another interest, from him, when the former will, of course, be the more valuable estate. Those who get the most and get it at once are each exempt to the amount of $2,000, while the others, who are postponed in the enjoyment of their legacies until the expiration of a life interest, can have only one exemption for all—they must share it together. I think the rule should be that the estate passing by the will which is exempt, if below a certain sum, refers to the
(263) portion of each devisee, legatee, heir, or distributee, and not to the whole estate of the decedent, so that a legacy or distributive share below the value is not taxable, although the estate to be distributed may, in the aggregate, exceed the statutory limit, and so with a devise or legacy to several persons, either directly or after a life estate, or where it is merely an usufructuary interest, as in this case. This is what the statute says in so many words, and it should receive an interpretation in harmony therewith. I believe, too, that the real intention was well expressed. The tax is laid upon the succession of each person to the property, and the exemption, therefore, applies to the separate legacies or distributive shares, and not to the total value of the property so received by bequest or inheritance. The following authorities strongly support this view: *S. ex rel. Basting v. Probate Court*, 101 Minn., 485; *S. v. Hamlin*, 86 Me., 495; *Booth v. Commonwealth*, 130 Ky., 88; *Howe's Estate*, 112 N. Y., 100. In *S. v. Probate Court, supra*, the Court says: "In determining the value of the estate of a deceased person for the purpose of fixing the amount of the inheritance tax, where the estate descends to two or more legatees or devisees in equal shares, an exemption to each should be allowed." So in *Booth v. Commonwealth, supra*, it is held: "The tax thereby imposed on legacies to strangers and collateral heirs and inheritances by collateral heirs is not the estate of the deceased, but that passing to a stranger or collateral heir, so that each legacy is entitled to the exemption; and this, though the executor or administrator is required to pay it in the first instance, he being also required to deduct it from the estate passing to the legatee or collateral heir." And in *People v. Koenig*, 37 Col., 283, it is said that, "As the tax is laid upon the receipt of 'such property by each person,' the exemption applies to the separate distributive shares and legacies, and not to the aggregate value of the property of the decedent." In *Howe's Estate* the Court of Appeals of New York held that the exemption of a certain portion of the estate from the succession tax applies not to the whole estate, but to the portion passing to each devisee, legatee, heir, or distributee, however it comes to him, whether by a single
(264) devise or by a devise to him and others of a class. The exemption is personal to the devisee or legatee, though the tax is upon

his share in the estate. Any other construction, it seems to me, will produce confusion in the application of the law.

The Revisal, sec. 2831 (1), does not apply. It is also expressly subject to the following qualification, "unless the context clearly shows the contrary," and this contextual meaning here is very clear.

Cited: *Norris v. Durfey,* 168 N. C., 325; *In re Inheritance Tax, ib.,* 356.

STATE v. ARTHUR JOHNSON.

(Filed 14 December, 1912.)

1. Murder—Evidence—Instructions—Less Offense—Harmless Error.

Upon evidence ample for conviction of murder in the first degree, for which the prisoner was convicted, a charge of the court, that if it satisfied the jury beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon they should at least convict him of murder in the second degree, is harmless, and an exception thereto immaterial.

2. Instructions—Objections and Exceptions—Specifications—Appeal and Error.

An exception to a charge of the court, that it was illogical and confusing and may have misled the jury to the prejudice of the objecting party, will not be considered on appeal when the particulars therein are not pointed out.

3. Court's Discretion—Motions—Verdict Set Aside—Appeal and Error.

An exception to the refusal of the court to set aside a verdict as being contrary to the weight of the evidence will not be considered on appeal, as that matter is within the discretion of the trial judge.

APPEAL by defendant from *Carter, J.,* at September Term, 1912, of PENDER.

Indictment for murder. The prisoner was convicted of murder in the first degree, and from sentence of death appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

No counsel for the prisoner.

BROWN, J. The prisoner offered no evidence, and that introduced by the State tends very strongly to prove that the prisoner (265) deliberately murdered his wife, Rosa Johnson.

There is evidence tending to prove that prisoner was walking with his wife some 50 yards behind their children. One witness testifies: "I saw Arthur with his hand behind him that way, and I heard the

report of a pistol. She jumped behind him and clung to his back. He got loose and then he shot her again. She ran to the old shanty. He ran and shot her there. Then she goes to the place where she was first hurt, and he shot her again there. She fell, and he stood there and looked at her and helped her up. She fell the second time. He looked at her and threw his head up and walked on off. He overtook his children, and then he began to run."

Another witness testifies: "I saw the shooting; I was walking along the street near the railroad. I heard squalling. I heard a woman squall, and about that time I saw the smoke of a pistol, before I heard the report of it. About that time, the same instant that I heard the report, she had clinched around his neck to the back of him; he threw her from the back to the front; she jumped to run; he ran behind her and shot her twice; then she wheeled in a circle; she stood up for an instant; he went to her and knocked her down, and after she fell he stood over her and looked at her and caught her by her dress."

There is only one exception to evidence, and there is no merit in that.

Exceptions 2 and 3 to the charge are practically the same, viz.:

"The court instructs you that if the evidence satisfies you beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon, you would at least convict the defendant of murder in the second degree."

There is not a scintilla of evidence upon which a verdict of manslaughter could have been based, and no such contention was made on the trial.

(266) As the prisoner was convicted of the greater offense of murder in the first degree, this exception is not material. Nevertheless, the charge is correct. *S. v. Worley,* 141 N. C., 764; *S. v. Cox,* 153 N. C., 638; *S. v. Simonds,* 154 N. C., 197.

Exception 4 is taken because his Honor told the jury that the prisoner had the right to rely upon the State's evidence to make out his defense. This part of the charge is unexceptionable so far as the defendant is concerned. It gave him the benefit of any of the evidence introduced by the State. He had offered none himself.

Exception 5: The defendant assigns as error that the court erred in the charge as delivered, in that the same was not a clear and concise statement of the law relative to the case, but that the same was illogical and confusing and may have misled the jury to the prejudice of the defendant. The appellant should have pointed out the particulars in which he thinks the charge was illogical and confusing. *S. v. Webster,* 121 N. C., 586; *Andrews v. Telegraph Co.,* 119 N. C., 403. We have examined the charge, however, and do not find that it is amenable to such criticism.

Exception 6: The defendant assigns as error that the court erred in refusing to set aside the verdict of the jury for that the same was contrary to the weight of the evidence. This is a matter in the discretion of the trial court, and not reviewable, *S. v. Hancock,* 151 N. C., 699; *S. v. Rose,* 129 N. C., 575. An examination of the record, however, discloses an unusually strong case as made out by the State.

This is a case where life is at strike. We have not been aided by argument or brief for the prisoner. We have examined the record with that care which the gravity of the issue demands, and we find

No error.

Cited: S. v. Cameron, 166 N. C., 384; *S. v. Wade,* 169 N. C., 308; *S. v. Merrick,* 171 N. C., 794, 799.

(267)

STATE v. L. HARRIS.

(Filed 14 December, 1912.)

Landlord and Tenant—Removing Crop—Statutory Notice—Burden of Proof—Interpretation of Statutes.

In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days previous notice before the crop had been removed.

APPEAL by defendant from *Cline, J.,* at February Term, 1912, of HERTFORD.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Allen.*

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Rowell C. Bridger and Winborn & Winborn for defendant.

ALLEN, J. The defendant was indicted for removing a crop without the consent of the landlord, and before satisfying his lien for rent and supplies. The case came up originally upon a statement of case on appeal settled by the judge. On motion of the defendant, a *certiorari* was issued to the judge to report to the court the exact facts in connection with the settlement of the case on appeal, and upon return of the writ the court ordered the defendant's case on appeal to be docketed

as the proper case, and the appeal now stands for hearing upon defendant's statement.

One witness only was examined in the court below, R. H. Reynolds, who testified as follows: "I live in Winton; I know the defendant, L. Harris. During the year 1911, and for three or four years before, defendant lived on my land as tenant and clutivated a crop—crop of cotton and other crops. Defendant owed me a balance of advances for the year 1911, something more than $14. That on 15 December, 1911, defendant had served on me, by the Sheriff of Hertford County, a written notice requiring me to divide said crops according to law, and within five days after service of said notices in pursuance of the notice,

(268) I went to the defendant's house, which was on the rented land, and divided the crops. The cotton was upstairs; we brought it down and divided it according to contract. I took my half and carried it away; the defendant's half was put back into the house. We had a conversation about balance due me. We finally agreed on a compromise for the sum of $11, the defendant saying at the time that he did not have the money to pay the $11 with, but would pay it in a few days. The advances for the year 1911 consisted of a balance brought over from 1910 account, in the sum of $18 old account. With the exception of $14 above mentioned, defendant denied owing that amount to me on 1911 advances. We finally agreed on a compromise in the sum of $11, which amount defendant said he would pay in a few days. This agreement was after the crop was divided. On 22 December, 1912, defendant, after the division of the crop, removed from the farm two bales of cotton and carried them to the cotton gin without paying the $11 compromise."

In apt time the defendant asked the judge to give the jury the following special instructions:

"The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days notice under the statute; and if the jury shall find from the evidence that the five days notice was given, removing the crop is not an offense, and the defendant would not be guilty." The court refused to so instruct the jury, and the defendant excepted.

"The burden is on the State to satisfy the minds of the jury beyond a reasonable doubt that the defendant did not give the landlord the five days notice required by law." The court refused to so instruct the jury, and the defendant excepted.

"That if the jury believe all the evidence in the case, the defendant is not guilty." The court refused to so instruct the jury, and the defendant excepted.

In *S. v. Crowder,* 97 N. C., 432, the Court holds that the offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord is not complete unless the crop is removed without giving the five days notice; for if the notice is given, (269) removing the crop is not an offense. The Court also holds that the burden is on the State to prove that the defendant did not give the five days notice required. Upon this authority we are led to the conclusion that the court erred in refusing to give the instruction asked, and the defendant is entitled to a new trial.

After quoting the statute, the Court says in the *Crowder case:* "The offense thus prohibited is not complete unless the lessee or cropper, or the assignee of either, or other persons, removed the crop or a part of it, without giving the lessor or his assigns five days notice of such intended removal, and this essential fact must constitute part of the charge in the indictment. The statute plainly so provides. It is not simply such removal without the consent of the lessor or his assigns and before satisfying all liens on the crop held by them, that constitutes the offense; this is not the offense prohibited, but it is this, done without giving five days notice to the lessor or his assigns, or his agent, that constitutes it. The purpose is to make it indictable to thus remove the crop or any part of it, without notice to the lessor or his assignee, and thus deprive him of just opportunity to enforce his lien, and to that end take such steps as need be taken to prevent such removal. If the notice is given, and the lessor or his assignee fails to enforce his lien and to take steps to prevent the removal, then it is not indictable to remove the crop. In that case the inference would be that the lessor or his assignee assented to the removal, or that he had no lien on the crop."

If the notice served on the landlord is the one required by law, the statute has been complied with, and if not, there is no evidence that the statutory notice was not given.

New trial.

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(270)

STATE OF NORTH CAROLINA EX REL. CORPORATION COMMISSION v. SEABOARD AIR LINE AND SOUTHERN RAILWAY COMPANIES.

(Filed 4 December, 1912.)

1. Railroad Commission—Union Depots—Appeal—Superior Court—Trial de Novo—Evidence—Practice.

On appeal from an order of the Corporation Commission requiring two railroads operating in the same town to have a joint or union depot there for passengers, the trial is *de novo* by express provision of the statute and tried under the same rules and regulations as are prescribed for the

trial of other civil causes; and any relevant evidence may be there introduced, whether it had theretofore been introduced before the Commission or not.

2. Railroads—Corporation Commission—Union Depots—Requisites of Order—Effect on Other Town—Evidence—Appeal and Error.

Revisal, sec. 1097, empowers the Corporation Commission to direct two railroads operating in the same town to have a joint or union depot, for their passengers, when practicable, or the necessities of the case require it for the security, accommodation, and convenience of the traveling public; and in this case, wherein a union passenger depot had been ordered by the Commission at Rutherfordton, it was *Held*, reversible error in the Superior Court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values at Hamptonville, a near-by town, where the present station of one of the roads is located.

APPEAL by plaintiff from *Justice, J.*, at January Term, 1912, of RUTHERFORD.

This is an appeal from the Corporation Commission from the findings and judgment of the Commission upon the petition of the citizens of Rutherfordton against the above defendants, requiring them to establish a union depot.

The following issues were submitted to the jury:

1. Is the establishment and maintenance of the proposed union depot at or near the Seaboard Air Line depot necessary to the convenience and accommodation of the traveling public? Answer: No.

2. Is it practicable for the Southern Railway Company and the Seaboard Air Line to be required to construct and maintain
(271) a union passenger station at the town of Rutherfordton? Answer: No.

3. Do the necessities of the case require that the Southern Railway Company and the Seaboard Air Line Railway Company construct and maintain a union passenger station at the town of Rutherfordton? Answer: No.

4. Has the Seaboard Air Line Railway a depot which is adequate and convenient and offers suitable accommodations for the traveling public? Answer: No.

5. Has the Southern Railway Company a depot which is adequate and convenient and which offers suitable conveniences for the traveling public? Answer: Yes.

6. What is the distance between the present Southern depot and the proposed union depot? Answer: Not over 1½ miles.

Upon the findings of the jury, the court rendered a judgment dismissing the proceedings, from which the plaintiffs appeal.

M. L. Edwards, C. R. Hoey, R. S. Eaves for plaintiffs.
O. Max Gardner for defendants.

BROWN, J. The first assignment of error is as follows: "The court ruled that the case stood for trial as other civil actions; that orders made by the Corporation Commission were *prima facie just* and reasonable; and that each side, plaintiff and defendant, had the right to offer any competent evidence in addition to the evidence offered before the Corporation Commission upon the hearing before it."

We are of opinion that his Honor was correct in trying the case bebore a jury *de novo*. The statute requires that appeals from the Commission shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed on the decision or determination made by the Commission shall be *prima facie* just and reasonable.

It necessarily follows, therefore, that neither the plaintiff nor the defendants are confined to the testimony submitted to the Commission. One of the earliest appeals from the Commission was the *Selma R. R. Connection Case,* 137 N. C., page 2. In that case the appeal was tried in the Superior Court of Wake County upon issues (272) submitted to the jury upon the trial, of which both parties were permitted to offer all the testimony, whether submitted to the Commission or not, which was relevant to the matter in dispute.

There are several assignments of error relating to the reception of evidence by the court which the plaintiff insists was incompetent and introduced into the trial an element entirely outside of the statute. These exceptions all relate to the testimony of witnesses as to what effect a union passenger station at Rutherfordton would have upon the adjacent village of Hamptonville.

It appears that Hamptonville is a thriving village of some 264 inhabitants, situated 1½ miles from Rutherfordton, and that the station of the Southern Railway at Hamptonville is now and always has been the station provided for the accommodation of the town of Rutherfordton.

His Honor permitted the witnesses to testify as to what would be the effect of the establishment of a union depot in Rutherfordton upon the property interests of the village of Hamptonville. Witnesses testified it would greatly depreciate the value of the property of the said village.

Other witnesses were permitted to testify that if the union depot was established where the Corporation Commission designated it, or near the present Seaboard Air Line depot, and the depot at Hamptonville abolished or its facilities diminished, it would result in the ruin of the said town, and that the business enterprises there would have to close up.

J. C. Hampton, a witness for the defendant, was permitted to testify that the establishment of a union depot at the proposed site, together with the discontinuance of the depot at Hampton or a decrease of the facilities there, would be like taking bread out of the mouths of the people of Hamptonville. We think it was error upon the part of the court to permit the introduction of this kind of testimony bearing upon the property interests of the village of Hamptonville.

It is true, his Honor laid no stress upon this evidence in his charge to the jury, and in a measure endeavored to neutralize its effect (273) upon the jury, but we think that so much of this evidence was permitted to be introduced that its effect upon the jury must have been very potential. It tended to raise an issue between the town of Rutherfordton and the village of Hamptonville to such an extent that the jury might well have lost sight of the real issue to be passed on by them.

Under section 1097, Revisal of 1905, the Corporation Commission is empowered to direct the establishment of union stations under certain conditions, to wit: when practicable and when the necessities of the case require two or more railroads entering a city or town to have one common union passenger depot for the security, accommodation, and convenience of the traveling public.

When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions, and conditions as the Corporation Commission shall prescribe.

We think that the evidence elicited from the witnesses did not bear upon any of the essential facts necessary to be used in this case and was calculated to divert the attention of the jury from the real issues before them.

The caution given to the jury by his Honor in his charge could not very well remove entirely from the minds of the jury the impression produced by such testimony. For these reasons we feel impelled to order another trial.

New trial.

CLARK, C. J., concurring: Revisal, 1097 (3), "empowers and *directs*" the Corporation Commission, whenever "in their judgment" it will make "for the security, accommodation, and convenience of the traveling public," to "require" a union passenger station to be established wherever two or more railroads shall enter any city or town. In *Dewey v. R. R.*, 142 N. C., 392, this section was held valid, and that the authority thus conferred on the Commission should receive a liberal construction in

favor of the power, and it was held further that it was intended (274) to apply to all cities and towns in the State where the Commission should find it to be practicable.

Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable." The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the commissioners. When there is an appeal from their order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The finding of the Corporation Commission that it is practicable is *prima facie* correct; and the burden is upon the defendant to show evidence to the contrary. In this case none was shown, and the judge should have directed a verdict affirming the order of the Corporation Commission.

The evidence whether the establishment of a union station for the accommodation and convenience of the traveling public at a point near Rutherfordton would be injurious to the interests of another station at Hamptonville was both incompetent and prejudicial, and a new trial is ordered on that ground.

Formerly, when a person started from Raleigh to New York he was compelled to leave the cars at the edge of Petersburg and be carried, together with his baggage, on conveyances through the city to the station on the other edge of the city. Exactly the same thing happened at Richmond, 22 miles further on, and again at Washington, and again at Baltimore, and again still at Philadelphia. Such annoyance and inconvenience to travelers by the antiquated method of people being conveyed through a city from one railroad station to another have long since been abolished nearly everywhere except in North Carolina. The object of this statute was to abolish it in this State in every case where it is "practicable" to do so, and there is probably not a place in the State where it is not practicable.

The courts have always held that railroads are built primarily for the convenience and accommodation of the public. *U. S. v. Freight Association*, 166 U. S., 322; *Wisconsin v. Jacobson*, 179 U. S., 296; *R. R. Connection case*, 137 N. C., 18, citing above. It is for this reason alone that they are given the power of eminent domain to condemn rights of way and have often had the benefit of bonds voted by the State, (275) counties, and towns. That they shall be profitable to their owners is a secondary consideration to the State, however it may be with the owners themselves. Every other business considers the convenience and desires of the patrons from whom their business and their profits are derived. It is strange that any railroad company will resist the demand

of any community or of the traveling public for a union station or better conveniences, since compliance is almost always profitable, as has been proven by the effect of the legislation requiring lower passenger rates and in many other instances. Because the managers of these corporations often do oppose the public demand for betterments and conveniances, the law creating the Corporation Commission was passed. The direction to them to order union stations in all towns where there are two or more railroads is imperative when in *their* judgment the convenience and accommodation of the traveling public require it, and their power is limited only by one qualification, "when practicable."

In this case the Corporation Commission found as a fact that a union station at Rutherfordton was "practicable," and there was no evidence to the contrary. The court, in my opinion, should have submitted the only issue contemplated by the statute, *i. e.*, whether the establishment of the union station was "practicable," and on the evidence should have directed a verdict and entered judgment affirming the order of the Commission.

Cited: Corporation Commission v. R. R., 170 N. C., 568, 569, 572.

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(276)

STATE AND FANNIE TERRY v. BUD CURRIE.

(Filed 14 December, 1912.)

1. Bastardy—Civil Action—Purpose.

Bastardy is a civil proceeding for the enforcement of a police regulation as far as it is necessary for the purpose of securing an allowance to the woman, and to relieve the county from the necessity of supporting the child.

2. Bastardy—Denial Under Oath—Justice's Court—Proceedings—Presumptions—Appeal and Error.

In bastardy proceedings it is necessary for the defendant to deny under oath the paternity of the child (Revisal, sec. 254), though not necessarily in writing, and when it appears that the case had been tried before the justice as if the denial had been made and verdict rendered for the defendant, it will be assumed in the Superior Courts on appeal that the trial proceeded regularly, and the justice failed to make the required entry.

3. Bastardy—Denial Under Oath—Justice's Court—Appeal—Incomplete Return—Docket—Practice.

In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his

docket and in his return; and if the docket is incomplete in this respect the Superior Court judge on appeal should allow the denial to be entered *nunc pro tunc.*

4. Same—Motions—Interpretation of Statutes—Substantial Compliance.

In the Superior Court on appeal in bastardy proceedings it is not necessary that the return of the justice, before whom the case was originally tried, technically comply with the direction of the statute; and if a more perfect return is desired, and it is substantially sufficient for the court to act upon, the court has statutory power to have one sent up. Revisal, secs. 1467, 1494.

5. Same—Practice.

A motion to dismiss, in the Superior Court, an appeal from a justice of the peace, based upon the defectiveness of the justice's return, should not be allowed when it sufficiently appears therefrom to inform the court of the course of the proceedings before the justice and to enable it to proceed to the trial of the cause. If the return is incomplete, the proper motion is to require a better one from the justice.

APPEAL by defendant from *Peebles, J.,* at September Term, 1912, of RICHMOND.

This is a proceeding against defendant for bastardy. The prosecutrix, Fannie Terry, made an affidavit before the justice of the peace, charging the defendant with the paternity of her child. There was a jury trial before the justice on 12 July, 1912, and a verdict of acquittal rendered. Judgment was entered upon the verdict, discharging the defendant and taxing the prosecutrix with the costs, from which she appealed to the Superior Court. The following are the entries on the docket of the latter court: (277)

"Number 92. State v. Bud Currie. Bastardy. Appeal by plaintiff from jury verdict. Docketed to September Term, 1912. Transferred to civil-issue docket. Set for trial second case at next civil term.

"Number 240. Fannie Terry v. Bud Currie. Transferred from State docket and docketed to September Term, 1912."

Defendant moved at September term to dismiss the appeal, and the judge found as facts upon the motion that the judgment of the justice was rendered on 15 July, 1912, and that the next regular term of the Superior Court (a criminal term) was held on 2 September, 1912. The justice did not make any return other than what appears on the docket in No. 92 at the criminal term, and in No. 240 at the civil term. No *recordari* was asked for by either party. Prior to the September criminal term, the justice delivered to the clerk of the Superior Court the warrant of arrest, containing the affidavit of the prosecutrix and other indorsements thereon, including the statement that the prosecutrix had appealed to the Superior Court, and the clerk docketed the case and

made the entries as appears. The appeal from the justice's decision was taken in open court at the trial. The judge ordered the action to be transferred to the civil-issue docket, and set it for trial at the next term, which convened on 23 September, 1912. Upon these facts and the papers in the cause, the court denied the motion to dismiss, and defendant excepted.

Upon an intimation by the court that, as defendant had failed to deny the accusation in writing and under oath, there was no issue raised by the pleadings, the defendant, before being called upon to plead and before the jury were impaneled, asked for permission to make denial under oath, and upon the request being refused, he tendered himself and others as witnesses, after being duly sworn by the court, to disprove the charge, and moved that they be heard. Both motions and the tender were refused, and defendant excepted.

(278) The court thereupon instructed the jury peremptorily to convict the defendant, holding that the affidavit of the prosecutrix was presumptive evidence of guilt. The jury returned a verdict of guilty, according to the judge's charge. Judgment that the defendant pay the prosecutrix the sum of $50 in monthly installments, as an allowance, and $1 as a fine, was entered. Defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Cox & Dunn for defendant.

WALKER, J., after stating the case: We said in *S. v. Addington,* 143 N. C., 683, that our decisions had finally determined this to be a civil proceeding for the enforcement of a police regulation, so far as it is necessary for the purpose of securing an allowance to the woman and to relieve the county from the burden of supporting the child. *S. v. Liles,* 134 N. C., 735; *S. v.* McDonald, 152 N. C., 802. The procedure in such cases is clearly prescribed by the statute. The warrant is issued by a justice of the peace, "upon the voluntary affidavit and complaint of the mother of the bastard," and the defendant, or putative father, is served and brought before him to answer the charge. If he denies the accusation under oath, the justice proceeds to try the issue of paternity, and if he is found to be the father of the child, or if he fails to deny the accusation under oath, "he shall stand charged with the maintenance of the child, as the court may order." Revisal, secs. 252-254. By section 255, the "examination of the woman" is made "presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant." We find nothing in the statute (sec. 254) requiring that the defendant shall make his denial

in writing, though it must be under his oath. Pleadings before justices may be oral, except when specially provided that they shall be in writing. In this case the record entries show that an issue was made up and tried before the justice, with the result that the defendant was acquitted. The case was tried before the justice as if the denial had been made. There could have been no issue to try unless it had been, and after verdict we must assume that the trial proceeded regularly and the justice failed to make the required entry. *S. v. Farrar,* (279) 104 N. C., 702. It appears inferentially that defendant was examined before the justice on oath. It is true that the justice should have taken the denial of defendant under oath before proceeding to try the case, so as to make up the issue, and should regularly note it on his docket and in his return. Under the facts and circumstances of this case, if the record was not complete in this respect, the judge should have allowed the denial to be entered *nunc pro tunc.* But while the return of the justice does not technically comply with the directions of the statute and is not in the regular form, it was substantially sufficient for the court to act upon, and if a more perfect return was desired, there was ample power to have one sent up. Revisal, secs. 1467 and 1494. "No process or proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment." Revisal, sec. 1467. "If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment." Revisal, sec. 1494. It would not be fair or just to the defendant, when the case was heard in the justice's court, either upon a proper denial, not noted in the return, or as if one had been made, without objection from the State or the prosecutrix, and after an acquittal, to summarily convict him upon the mere affidavit of the woman, and without giving him an opportunity to defend himself.

The appeal was docketed at the first term succeeding the date of the trial before the justice, and was prosecuted in due time. We infer from the nature of the findings of fact, in connection with the motion of defendant to dismiss the appeal, that it was based upon the defectiveness of the return. It was not in proper form, as we have said, but enough appeared therefrom to inform the court of the course of (280) the proceedings before the justice and to enable it to proceed to

the trial of the case. If it was incomplete, the motion should have been to require a better return from the justice. The judge was right in refusing the motion to dismiss, but he erred in not having the case tried upon the general issue, or the denial by defendant of the paternity of the child as alleged by its mother.

The judgment will be vacated and a new trial is ordered.

New trial.

STATE v. JOE TATE.

(Filed 14 December, 1912.)

1. Murder—Threats—"Jest or Earnest" — Evidence — Premeditation — Manslaughter—Harmless Error.

Upon this trial for murder there was competent evidence of the prisoner's prior threat to whip the deceased: *Held*, it was competent for a witness in defendant's behalf to answer a question as to whether "he seemed to be in jest or earnest," not being objectionable as opinion evidence, but a statement of a matter of observation: and *Held further*, to be harmless error upon a conviction of manslaughter, as it was competent only as tending to show premeditation, which was not necessary to be established on a conviction for that offense.

2. Homicide—Dying Declarations—Harmless Error.

On this trial for murder there was evidence that the prisoner had cursed the deceased, threatened his life, told him he would kill him, fired the fatal shot, started to shoot again, but was begged by deceased to desist, as he had already killed him, shortly followed by death: *Held*, evidence of the declarations of deceased made after he had been shot, under the circumstances, is competent as dying declarations.

3. Murder—Secret Assault—Evidence—Instructions.

Upon this trial for murder there was evidence in behalf of the prisoner tending to show that after he had abandoned the fight and was walking away, the deceased began firing upon him: *Held*, the charge of the judge upon the principles of law relating to a secret assault and the rights of the prisoner to pursue the deceased until he had secured himself from danger is approved.

4. Murder—Instructions—Charge, How Construed—Harmless Error.

While it appears that in one part of the charge the court made the reasonable apprehension of danger to rest upon the evidence of the prisoner, upon his trial for murder, it also appears, taking the charge as a whole, that it was an inadvertence, which was corrected elsewhere and repeatedly stated, and no reversible error is found. *S. v. Price*, 158 N. C. 650.

5. Murder—Flight and Concealment—Evidence—Appeal and Error.

In connection with the other circumstances of this trial for murder, the flight and concealment of the prisoner, while it raised no presumption of law as to his guilt, was held competent.

APPEAL by defendant from *Lane, J.*, at Spring Term, 1912, of (281) CHEROKEE.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Attorney-General for the State.
Witherspoon & Witherspoon, Dillard & Hill for defendant.

CLARK, C. J. The prisoner was indicted for the murder of R. L. Thompson. He was found guilty of manslaughter, and appeals from the judgment sentencing him to the State's Prison for a term of two years. There was evidence that the deceased and the prisoner had a quarrel on he railroad about 2½ miles from Murphy. Witness Maddox testified that about 2 o'clack that day Tate bought a pistol and cartridges and wrapped them up in paper. Another witness testifies that about 3 P. M. on the same day he heard Tate say that he was going to kill Thompson before the sun went down. Another witness testified that about 4 o'clock he overtook Tate, and that Tate showed him his pistol and said he was going to "get a man with it." Still another witness testified that he saw the parties in town that day and heard Tate say that Thompson, the deceased, had been telling lies on him; that he whipped him once and would whip him again. Four witnesses testified that they saw the difficulty in which the shooting occurred; that it was late in the afternoon, as they were going home from work. They said they saw Thompson shoot at Tate and saw Tate pull something out of his pocket wrapped up in tisue paper; it was at a rail- (282) road cut near a curve. The witnesses ran around the curve as soon as the shooting began, and they heard one or more shots shortly after. Two of the witnesses, Stewart and Grant, testified that they heard Tate ask Sudderth to whip the deceased, and Sudderth testified that when Tate took the package out of his pocket the deceased ran off about ten or fifteen yards; Tate subsequnetly overtook the witnesses, and at that time had his pistol in his hand. Witness Francis testified that after the shooting Thompson came to where he was standing, and blood was running down his left hip. Stewart also testified that Thompson came to where he was standing and lay down against a big rock and had blood on his hip. Knobblett testified that he heard quarreling at that time, one man calling another a lie and the other asking someone to whip another, and then he heard a pistol shot and the sound of feet

running away. He testified quite fully to the altercation on that occasion. The deceased was taken to the home of the sheriff, and on the next day was operated upon and died on the morning following.

The first two assignments of error are on the ground that the court excluded the question whether when Tate threatened to whip Thompson "he seemed to be in jest or in earnest." The court probably excluded this question, we presume, because he deemed it an expression of opinion, though the reason is not given. But if that is the ground, we do not think his Honor was correct. It was a statement of a matter of observation. *Britt v. R. R.*, 148 N. C., 37, and cases there cited. But this evidence, if admitted, would have been competent only as tending to show premediation or malice, and as the defendant was acquitted of murder and convicted only of manslaughter, the error was harmless. *S. v. Worley,* 141 N. C., 766; *S. v. Munn,* 134 N. C., 680; *S. v. Teachey,* 138 N. C., 598.

The exceptions to the admission of the dying declarations are not well taken. The evidence is plenary that the deceased stated he "believed that he was going to die." The deceased stated that the prisoner came up behind him and charged him with lying, and with an oath said, "I have got you where I want you, and I am a notion to
(283) kill you," and he held his pistol out in front of him and gritted his teeth. Deceased then related the altercation and said the prisoner told him, "March up, damn you; march up. I am going to kill you," and that he walked ten or twelve steps, and the prisoner shot him; that afterwards the prisoner came down where he was and said get up, and added with an oath, "I am going to kill you." That he "begged him not to shoot and told the prisoner he had already killed him," There was no error in the admission of the dying declarations.

There were several exceptions to the failure to give prayers and to the charge, but practically there is but one exception that needs to be seriously considered.

The charge of the court was as follows: "As to the reasonableness of this apprehension under which the defendant acted, you are to be the sole judges, and to find from the evidence whether or not he acted from necessity or whether the danger actually existed, but it is sufficient if it reasonably appeared to be necessary; so if you find from the evidence that, at the time the shot was fired, the defendant had in good faith abandoned the fight and had retired, and that he found that unless he himself shot he would be killed, or would be in danger of great bodily harm, he himself being without fault, as I have said, you being the judges of the reasonableness of the apprehension, then it would be your duty to acquit the prisoner."

The above was not in the exact words, but in substance the prayer requested by the prisoner, and was a fair statement of the law applied to the facts of this case.

The court was requested to charge: "The prisoner contends that the deceased made the first assault upon him, with a deadly weapon, at a time when his back was turned, and when he had left the scene of the quarrel and started toward his home, and was ignorant of the purpose of the deceased to assault him with a deadly weapon and in a secret manner. The court charges you that if you find from the evidence that Tate and Thompson, a short time prior to the killing, had been engaged in a quarrel, and that Tate had abandoned the quarrel and had started toward his home, and that after he had gone some steps in the direction of his home, being ignorant of Thompson's purpose so (284) to assault him, he was shot at by Thompson, this, under the law, was a secret assault and a felony, and the court charges you that if you find from the evidence that the deceased, Thompson, committed a secret assault upon Tate, as defined, and that at a time when Tate was not aware of his purpose, but when he started towards home, Tate had a right to oppose Thompson's purpose, as shown by his act, to the point of killing him, and he owed no duty to retreat, but had the right to pursue Thompson until he had secured himself from danger; and if the jury find that he did kill him under such circumstances, the court charges you that this would be excusable homicide, and it would be your duty to acquit him."

In response, the judge charged as follows: "Now, the prisoner contends, as I have said, that the deceased made the first assault, after he had turned away and had abandoned the quarrel, nd was going towards his home, and that he was innocent of Thompson's purpose to assault him, and the court charges you that if you find that Tate had been engaged in a quarrel with Thompson, but that he had, in good faith, abandoned the quarrel and had started toward his home, and that he had gone some in the direction of his home, but being innocent of Thompson's purpose to shoot him, and that he was then shot at by Thompson, that this under the law would be a secret assault, and would amount to a felony, and the court charges that if you find from the evidence that this was a secret assault, and that Tate was going away, and was innocent of Thompson's purpose to shoot him, and that he was on his way home and had abandoned any difficulty that had previously occurred, then Tate had the right to oppose Thompson's purpose, even to the point of killing him, if necessary, and then it would not have been incumbent upon him, if the circumstances were that way, to retreat, but he had the right to pursue Thompson until he had secured himself

from danger, and if the jury find that he did kill him under such circumstances as that, it would be excusable homicide, and it would be the duty of the jury to acquit him.

"Now, the court charges you that if you find from the evidence
(285) of the prisoner that he acted under the reasonable apprehension that he was in danger, and was still being pursued by Thompson, who was still armed with a pistol, which is a deadly weapon, if he had abandoned the quarrel and was on his way toward home, the prisoner had the right to go to the length of taking his life, if necessary; you being, as I have said before, the judges of the reasonableness of the apprehension on his part."

We do not think that there was any substantial error. It is true that in one place the court said, "if you find from the evidence of the prisoner he acted under reasonable apprehension," etc., but the court did not confine the charge to the evidence of the prisoner. But at one place he charged, "If you find from the evidence that at the time Tate shot and killed the deceased he had a right to reasonably apprehend," etc. And again he charged, "If you find from the evidence," etc. And immediately preceding this portion of the charge objected to, the judge said, "If you find from the evidence," etc. If the instruction complained of was anything more than a mere inadvertence, which did not even attract the attention of the jury, it is amply cured by the whole tenor of the charge, which upon this and every phase of the testimony instructed the jury, "If you find from the evidence," etc. It is not the case of contradictory charges, but of a mere lapse or inadvertence, which was fully cured by the charge taken as a whole.

The whole subject is so fully discussed and the true rule fairly stated by *Walker, J.*, in *S. v. Price,* 158 N. C., 650, that it need not be repeated here, where he says: "A careful review of the charge satisfies us that the court fully responded to this request and instructed the jury substantially and in accordance with its terms. It is not required that the very language of a prayer should be used in giving the instructions asked for, but it is sufficient for the court to instruct the jury substantially as requested in its own words, provided—if the party is entitled to the instruction—its force is not weakened or its meaning materially altered by any change in the language. It is true, the court told the jury that the prisoners must have killed in their necessary self-defense, but
(287) he explained to the jury what was meant by this expression in other parts of the charge, and substantially instructed the jury, in language that could not well have been misunderstood, that if the prisoners had reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they

should acquit the prisoner. The charge must be read and construed as a whole. *S. v. Exum,* 138 N. C., 600; *Kornegay v. R. R.,* 154 N. C., 389; *S. v. Lewis, ib.,* 632. When thus considered, it is a full and clear exposition of the law and is applicable to the facts." Taking this charge as a whole, we do not think the jury could have misunderstood the plain meaning of the judge, that they were to consider all the evidence in coming to their conclusions.

It was further excepted that the court admitted evidence as to the flight of the prisoner after the killing. But such flight or concealment of the accused, while it raised no presumption of law as to guilt, is competent evidence to be considered by the jury in connection with the other circumstances. 12 Cyc., 395; 21 Cyc., 941.

On consideration of all the exceptions, we think the prisoner has had a fair trial, in which the judge has committed no prejudicial error.

No error.

WALKER, J., concurs in result.

Cited: S. v. Shouse, 166 N. C., 308.

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STATE v. HENRY CHARLES.

(Filed 20 December, 1912.)

1. Appeal and Error—Printing Record—Deposit for Cost—Laches.

If the record has not been printed, and appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this Court, the appeal will be dismissed for failure to print the record as required by the rule, the laches in the case being imputable to the party appealing and not to his attorney.

2. Instructions — Criminal Actions — Reasonable Doubt—"Fully Satisfied"—Burden of Proof—Words and Phrases.

On trial for a criminal offense, the judge is not held to any set formula as to reasonable doubt, in his instruction upon the quantum of proof in order to convict, and, upon conflicting evidence, an instruction that the jury "must be fully satisfied of defendant's guilt before they can convict him," is not erroneous.

APPEAL by defendant from *Allen, J.,* at July Term, 1912, of FORSYTH.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Attorney-General for the State.
Folger for defendant.

WALKER, J. This is a motion to reinstate the case, which was dismissed 7 November, 1912, at this term, on motion of the Attorney-General, for failure to file an appeal bond, or to print the record, or to assign errors. Counsel of defendant base the motion to reinstate the appeal upon the ground that the appeal bond was filed with the clerk of the Superior Court on 2 November, 1912, and was mailed to the clerk of this Court at once, but failed to reach him, and was returned to the clerk who mailed it, for the lack of sufficient postage. It was thereupon mailed again, but was received by the clerk of this Court too late, as the case had been dismissed. Defendant says that he did not print the record for that he was relying on the clerk of this Court to do so, as he had filed a bond, or supposed it had been filed here. But this is not a sufficient excuse. If the clerk of the Superior Court had failed inadvertently to stamp his letter to the clerk of this Court, it might furnish some ground for indulgence to the appellant, but as to the failure to print the record, the invariable rule and practice of the clerk's office here is to require a sufficient deposit to cover the cost of printing, and this is a wise rule, for if the appellant succeeds in this Court, the clerk would practically have no recourse against any one for the cash advanced by him for the printing of the record. It is our opinion, therefore, that the defendant, not his counsel, was guilty of laches in failing (288) to print the record, and for this reason, and because no errors are assigned, we deny the motion to reinstate. But we have, nevertheless, most carefully examined the case on appeal and the record, and find no error therein. The only question which should be considered is the one raised by the exception to the judge's instruction, that the jury must be fully satisfied of defendant's guilt before they can convict him, and if they are not fully satisfied that he sold the liquor to David Wilson, as charged in the indictment, they should acquit him. The defendant's counsel contend that this charge deprived defendant of the benefit of the doctrine of reasonable doubt. We do not think so. In explaining to the jury the rule as to a reasonable doubt and the correlative one as to the presumption of innocence, no particular or set form of words is prescribed by the law for the use of the judge. It was said in *S. v. Parker,* 61 N. C., at p. 477: "All that the law requires is that the jury shall be clearly instructed that, unless after due consideration of all the evidence, they are 'fully satisfied' or 'entirely convinced,' or 'satisfied beyond a reasonable doubt' of the guilt of the prisoner, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury, by which to 'gauge' the

degrees of conviction, has resulted in no good." The matter was strongly put by *Judge Reade* in *S. v. Sears,* 61 N. C., 146, in which the prisoner had requested the court to instruct the jury that "they must be satisfied beyond a reasonable doubt," which prayer he refused, and then charged that they must be fully satisfied. It was said by the Court: "His Honor had charged the jury that 'they must be satisfied, fully satisfied, etc.' 'Fully satisfied' is at least as favorable for the defendant as 'satisfied beyond a reasonable doubt.' For the latter implies that there may be a conviction, although there may be ever so many doubts other than reasonable. But *fully satisfied* is to the exclusion of all doubts, reasonable or other. It is said that it is difficult for the jury to understand what 'fully satisfied' means. It is at least as difficult for them to understand what 'reasonable doubt' means. The error consists in supposing that any particular formula of words is necessary, or that any (289) have been prescribed. It is a great first principle, founded in justice as well as in humanity, that the innocent shall in no case be punished. It follows that before any one can be punished there must be a certainty of his guilt." Again in *S. v. Knox,* 61 N. C., 312, the Court, by *Judge Reade,* considered the same question and arrived at the same conclusion, using this language: "Whatever be the charge, the law requires that the evidence shall produce that result which very commonly is described as involving an absence of 'reasonable doubt,' but which may be denoted as well by other language; as, for instance, upon the whole, by that which here has been employed by the court below. We have taken occasion recently to say that there is no formula in the phrase 'reasonable doubt.' *S. v. Sears, ante,* 146. What is demanded is that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence (*a presumption for all grades of offenses*), and to the consequent rule as to the burden of proof." These cases have been often cited and approved. Reviewing them and citing the cases of *S. v. Norwood,* 74 N. C., 247, and *S. v. Gee,* 92 N. C., 761, with approval, we said in *S. v. Adams,* 138 N. C., 688: "The presiding judge may select, from the various phrases which have been used, any one that he may think will correctly inform the jury of the doctrine of reasonable doubt, or he may use his own form of expression for that purpose, provided, always, the jury are made to understand that they must be fully satisfied of the guilt of the defendant before they can convict him." And again: "If the judge charges the jury in substance that the law presumes the defendant to be innocent, and the burden is upon the State to show his guilt, and that upon all of the testimony they must be fully satisfied of his guilt, he has done all that the law requires of him, the manner in which it shall be done

being left to his sound discretion, to be exercised in view of the facts and circumstances of the particular case."

There was ample evidence to support the verdict of the jury. The prosecuting witness testified positively and directly to the fact of sale, under circumstances which gave weight and force to his testi-
(290) mony, and the defendant's witness, who was introduced to contradict him, was thoroughly discredited, if the jury believed the two State's witnesses, and they seem to have done so.

We have considered the case on its merits, notwithstanding the failure to comply with the rules of this Court, which are simple in form and perfectly intelligible. Their enforcement is absolutely necessary to the proper transaction of the business of this Court.

Motion denied.

STATE v. WALLACE BRADLEY.

(Filed 14 December, 1912.)

1. Appeal and Error—Objections and Exceptions—Evidence—Record—Harmless Error.

When the evidence proposed to be elicited from a witness does not appear in the case, an objection thereto will not be considered, as it must be shown to have been prejudicial.

2. Homicide—Motive—Evidence—Res Gestæ.

On a trial for murder, a conversation by a witness with the prisoner, in which the latter said, with reference to the deceased, that "the tale about his poisoning dogs all over the county was the cause of all the trouble," was competent as evidence of a motive for the homicide; and the circumstances under which the witness and prisoner met and what was done at the time of the conversation, being *pars rei gestæ*, are competent as throwing light on what was said.

3. Appeal and Error—Character Witnesses—Questions and Answers—Harmless Error.

An answer favorable to the prisoner, on trial for murder, to an objectionable question asked a witness, as to whether he thought a man who would do certain specified things is a man of good character, is harmless error.

4. Murder—Instructions—Mutual Combat—Evidence—Record—Harmless Error.

On a trial for murder, where there was no evidence in the case that the prisoner and deceased were engaged in mutual combat on equal terms, but it appeared that the prisoner was all of the time the aggressor, and the defendant was convicted of murder in the second degree:

Held, it is not reversible error for the judge to have charged the jury upon the phase of mutual combat; as, under the circumstances of this case, an instruction would have been proper that there was no evidence of manslaughter, the killing with a deadly weapon having been shown and not denied, and the burden of proving facts in mitigation and excuse being on the defendant.

APPEAL by defendant from *Long, J.*, at July Term, 1912, of (291) SWAIN.

The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Bryson & Black and J. W. Ferguson for defendant.

WALKER, J. The prisoner was indicted in the court below for the murder of Anderson Blankinship, and tried for murder in the second degree, the solicitor not insisting on a verdict for murder in the first degree. He was convicted of murder in the second degree, and, having excepted to several rulings of the court, appealed from the judgment rendered upon the verdict.

His first exception is to the refusal of the court to require a witness, M. T. Battle, the justice of the peace who conducted the preliminary examination, to refresh his memory from the written testimony of Roxie Williamson, taken by him at the trial, when he was asked if Roxie Williamson testified that the wagon had moved after the shots were fired. He answered that, as he recollected, she said it was moved once. It has been held that a witness may be compelled to refresh his memory by a written memorandum, in court and accessible to him (*Davenport v. McKee*, 94 N. C., 325), and it is said in *S. v. Staton*, 114 N. C., 813, citing 1 Greenleaf on Evidence, sec. 437, that the party examining him may demand that he do so. 40 Cyc., 2449 *et seq.* It will appear from the last book cited that the authorities are not uniform upon this question, some holding that it is a matter within the sound discretion of the court. But in this case, the testimony of Roxie Williamson is not in the record, nor is her testimony, which was taken by the magistrate and reduced to writing, and we cannot, therefore, see that (292) the ruling of the court was prejudicial, if incorrect.

The conversation of the prisoner with D. M. Cole, shortly after the homicide was committed, in which he stated that "the tale about his poisoning dogs all over the county was the cause of all the trouble," was competent as evidence of a motive for the killing. The circumstances under which they met in the road and what was done at the time of the conversation were but parts of the transaction, *pars rei gestæ*, and

competent as throwing light upon what was said. 21 Cyc., 899, 916, and 939; *S. v. Mace,* 118 N. C., 1244; *S. v. Adams,* 138 N. C., 688. The question put to the defendant's witness, J. R. Floyd, by the solicitor, as to whether he thought a man is of good character and law-abiding who carries a pistol and drinks whiskey, or goes to a baseball game and drinks whiskey, if objectionable, was harmless, as the witness's answer to it was entirely favorable to the prisoner, and the Court will not reverse a judgment because of the admission of evidence which is not prejudicial and could not have affected the verdict. *Glover v. Flowers,* 101 N. C., 134, and cases cited.

The principal exception in the case is to the following charge of the court: "If you find that the prisoner and the deceased were engaged in a mutual combat, and were fighting on equal terms, and you find that the prisoner shot the deceased, and that the deceased quit the combat and fled, and you find that while the deceased was in flight and disabled from any further combat, that the prisoner shot him under these circumstances in the back or from the rear, causing the death of the deceased, the prisoner would be guilty of murder in the second degree."

There is no evidence to be found in this record tending to show that the prisoner and deceased were engaged in a mutual combat on equal terms. On the contrary, the evidence shows that the prisoner was all the time the aggressor, that he shot deceased without any provocation, and after shooting and disabling him, and when deceased fled, that he pursued him and shot two or three times, and that soon thereafter the wounds thus inflicted on deceased caused his death. The evidence discloses the fact that the prisoner, instead of killing in the heat of
(293) passion or upon a legal provocation, took advantage of deceased, who was unarmed and doing or saying nothing to provoke him, and fired upon him several times, inflicting five wounds, some of them mortal. In the most favorable view of the evidence that can be taken for the prisoner, it has the appearance of being a coolly planned, willful, premeditated, and deliberate murder, and there was no error in the instruction. *S. v. Hinson,* 150 N. C., 827. His Honor might well have charged the jury that there was no evidence of manslaughter, the killing with a deadly weapon having been shown and not denied, and the burden of proving facts in mitigation and excuse being upon the defendant. *S. v. Quick,* 150 N. C., 820. The cases of *S. v. Hildreth,* 31 N. C., 429; *S. v. Ellick,* 60 N. C., 451, and *S. v. Tackett,* 8 N. C., 220, relied on by the prisoner's counsel, are not in point. The conviction was of murder in the second degree and after a careful examination of the case, as presented to us in the record, we find

No error.

Cited: *S. v. Blackwell,* 162 N. C., 684.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1913

D. A. MADRY v. H. H. MOORE.

(Filed 26 February, 1913.)

1. Motions—Nonsuit—Evidence, How Considered.

Upon a motion to nonsuit, the evidence must be viewed in the light most favorable for the plaintiff, approving *Brittain v. Westhall*, 135 N. C., 492.

2. Same—Ejectment—Defendant's Title.

Where plaintiff and defendant both claim title to lands, by deeds from a common source, and it appears from the defendant's deeds in evidence that questions were raised for the jury as to his title to the *locus in quo*, it is error for the court to grant a motion of nonsuit upon the evidence.

3. Same—Questions for Jury.

Both parties to this action to recover lands claiming under a common source of title, it is *Held* that the variance in the deeds in defendant's chain of title as to description, number of acres, etc., raised a question for the determination of the jury as to his title.

4. Deeds and Conveyances—Ejectment—Descriptions—Definite Tract—"Formerly Owned"—Words and Phrases.

Where in an action for the possession of lands, both parties claiming from a common source of title, the first deeds in defendant's chain recite the lands as the land "formerly owned by" A., but in the deed made directly to him it is described as "the land known as the A. tract," it is *Held*, there is a difference in the designation of the lands, for the lands, as to a whole or part, may have been owned by A., while describing the land as the "A" tract at least raises a question for the determination of the jury as to whether a separate and distinct tract by that name was conveyed, it being same evidence of location.

APPEAL from *Webb, J.*, at the August Term, 1912, of HALIFAX.

(296) The facts are sufficiently stated in the opinion of the Court by MR. JUSTICE WALKER.

G. M. T. Fountain & Son for plaintiff.
E. L. Travis and A. P. Kitchin for defendant.

WALKER, J. This action was brought to recover the possession of 10 acres of land lying on the south side of a certain black gum and ditch mentioned in some of the deeds. Both parties claimed title under James Rogers and wife, Emerliza Rogers. James Rogers purchased the entire tract of 60 acres by deed from M. D. Allsbrook, dated 13 December, 1892, in which the land is described as follows: "That tract of land formerly owned by Bennett Allsbrook, adjoining the lands of Kelley Edwards, Dick Joyner, Dr. W. T. Savage, James Rogers, and the Gray land, containing about 60 acres." James Rogers, on 18 February, 1901, conveyed by deed to Jesse Manning a tract of land by the following description: "That tract of land formerly owned by M. D. Allsbrook, adjoining the lands of Kel. Edwards, Dick Joyner, Miniza White, and others, commencing at a black gum and ditch, containing 50 acres, more or less." Plaintiff contends that this deed conveys only a part of the original Bennett Allsbrook tract of land, while defendant insists that it conveys all of it, 50 acres of it and not the 10 acres north of the ditch. Jesse Manning, on 26 January, 1905, conveyed to A. P. Kitchin a tract of land with the following description: "That tract of land formerly owned by M. D. Allsbrook, conveyed to said Manning by James Rogers and wife by deed, in Book 149, page 593, in the register's office of said county, containing 50 acres, more or less, bounded on the north by Mrs. Emerliza Rogers, on the west by the land of the estate of Ben Lewis, on the south by the land of Olive White, and on the east by M. D. Joyner and A. P. Kitchin." The same contention is made in

(297) regard to this tract as in the case of the one just mentioned. A. P. Kitchin conveyed to H. H. Moore, the defendant, a tract of land by the following description: "That tract of land known as the M. D. Allsbrook tract, containing 60 acres, more or less, which was conveyed to said A. P. Kitchin by Jesse Manning and wife, adjoining the first mentioned tract on the east, the lands of Allie White on the south, along a branch; the Gray land on the west, and the home place of the late James Rogers on the north." Said deed also contains the following warranty: "And the said parties of the first part covenant to and with the said Moore and his heirs and assigns that they are seized of said premises in fee, and that they have the right to convey the same, and that they will warrant and defend the title to same against all

lawful claims, except 10 acres on the north side second tract mentioned above, which is in dispute, but which is the property of the said A. P. Kitchin, but is claimed by one D. A. Madry." This deraigns the defendant's paper title. The plaintiff claims title under deeds from Emerliza Rogers and Dolly Cobb, containing the same description, and conveying the 10 acres which are in dispute. The title is out of the State and both parties claim from the same source. The question of difference between them is whether the defendant's deeds cover the 10-acre tract, and if they do, the plaintiff alleges, and attempted to show, that it was not intended to be embraced by the descriptive words of the deeds, but was included therein by mutual mistake of the parties and the inadvertence of the draftsman. It will not be necessary to consider the equity thus set up, as we are of the opinion that there was evidence that the defendant's deeds did not cover the *locus in quo*, and the judge therefore erred in dismissing the action, as upon a nonsuit, for the total lack of proof to sustain the plaintiff's first contention. The jury may find at the next trial that defendant's deeds do not embrace the 10 acres, and for this reason the deed may not require correction in the particular alleged. But if it should become necessary to pass upon the plaintiff's alleged equity, we think that evidence was rejected which, with that admitted, was sufficient for the consideration of the jury upon the question of mistake, though we do not intimate any opinion (298) upon the other question raised by the defendant as to plaintiff's right to assert that equity, it being alleged that he is a mere volunteer and that the consideration of the deed to him by Emerliza Rogers was champertous.

Passing to the other question, it must now be taken as settled that the testimony upon a nonsuit must be viewed most favorably for the plaintiff. *Brittain v. Westhall*, 135 N. C., 492; *Deppe v. R. R.*, 152 N. C., 79. We stated the rule thus in *Brittain v. Westhall, supra:* "It is well settled that, on a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony. *Purnell v. R. R.*, 122 N. C., 832; *Hopkins v. R. R.*, 131 N. C., 463," and as thus stated, the rule was expressly approved in *Morton v. Lumber Co.*, 152 N. C., 54, and *Deppe v. R. R., ibid.* 79. With this rule kept in view, we proceed to consider the testimony with reference to the correctness of the judgment of nonsuit.

Without attempting to analyze the evidence minutely and to consider its strength and effect, which might prejudice one or the other of the

parties at the next trial, we content ourselves with stating generally that there was evidence upon the face of the several deeds, the difference in the number of acres conveyed, the change in the phraseology, from that employed to describe the land in the deeds from James Rogers to Jesse Manning, and from the latter to A. P. Kitchin, to that of the deed from the latter to H. H. Moore. In the two former deeds the land is described as "the tract formerly owned by Bennett Allsbrook" or "the tract formerly owned by M. D. Allsbrook," while in the latter deed the description is "the land known as the M. D. Allsbrook tract." A part of a tract of land might well be described as the land formerly owned by Bennett Allsbrook or M. D. Allsbrook, when he owned the entire tract, for he is as much the owner of a part as the whole; (299) but when the tract is described as the one known as the M. D. Allsbrook tract, it means a separate and distinct tract by that name, and not a part of a larger tract which had that designation, or at least the jury would be well warranted in considering the difference in description as some evidence of location. Again, the number of acres in the last of the deeds is increased by 10 over the acreage of the tract described in the earlier deeds. There was room here for the jury to inquire why, if the former description included the 10 acres, it was not sufficient to follow it even literally in the last deed. The deed from M. D. Allsbrook to James Rogers conveyed a tract "containing about 60 acres," the deeds from James Rogers to Jesse Manning and from Manning to A. P. Kitchin convey by the same description a tract "containing 50 acres more or less," or 10 acres less than the first deed, and the deed of Kitchin to defendant a tract "containing 60 acres, more or less," or 10 acres more than the other two deeds. There are other considerations that might be noted, which arise upon a careful reading of all the deeds under which the defendants claim. We also think that there was oral testimony bearing upon the question of location. There was evidence that after the deeds were executed to Manning and Kitchin, they took possession only of the land on the south side of the ditch, and Jesse Rogers, as long as he lived, and Mrs. Rogers, his widow, after his death, continued to occupy the land on the north side of the ditch, that is, the 10 acres in dispute. It also appeared, without objection, that Mrs. Rogers had called upon one of the parties to inquire why he claimed her land, and while he asserted his title to it, she was offered $50 for her claim, or a life estate in the land if she would pay for a part of the ditching. She also testified that the 10 acres are a part of the M. D. Allsbrook tract of land, and that she did not comply with the agreement to ditch the land, as she found when she read the paper that it required her to do all of the ditching for the entire farm, instead only of that on her side of the ditch, and it was not what she agreed

to do, and cost too much for her to pay. It must not be understood that we are intimating any opinion as to the force or weight of the evidence, but consider only the question whether there is any (300) evidence, leaving the weight of it entirely to the jury. Upon a review of all the testimony, our conclusion is that the case should have been submitted to the jury, with proper instructions from the court upon the question of location, that is, to determine whether or not the ditch is the dividing line.

New trial.

C. C. PIERCE ET AL. v. B. P. COBB ET AL.

(Filed 5 March, 1913.)

1. Divorce—Notes—Contracts—Illegal Consideration—Remedies.

Notes given by the husband in consideration of the procurement by the wife of a divorce *a vinculo* is against public policy and not enforcible, as the law will not afford a remedy to compel either of the parties to perform its obligation.

2. Divorce—Notes—Contracts Written — Illegal Considerations — Parol Evidence.

A note containing an indorsement that it was given in consideration of the wife of the maker obtaining a divorce *a vinculo* from him in six months, otherwise not collectible, and that payee agrees thereto, appears upon its face to arise *ex turpi causa*, and it may not be shown, in a suit by the payee thereon to purge the instrument of its illegality, that its consideration was not correctly stated in the writing, but in fact was for the payment of alimony, the parol evidence proposed being contradictory of the written instrument in that respect.

APPEAL by plaintiffs from *Bragaw, J.*, at the November Term, 1912, of PITT.

Ward & Grimes for plaintiff.
Albion Dunn for defendant.

WALKER, J. This action was brought to recover the amount of two notes under seal, dated 1 April, 1911, one for the sum of $500 due 10 June, 1911, and the other for $1,000 due 15 October, 1911, with interest after maturity. The notes were payable to C. C. Pierce and F. C. Harding, attorneys of Mrs. Ruth Cobb, plaintiffs, and were signed by B. P. and J. H. Cobb, defendants. On the back (301) of the notes, at the time they were executed, was the following: "It is fully understood and agreed that this note shall not become due nor collectible in any event until Mrs. Ruth Cobb shall have obtained

from her husband, the said B. P. Cobb, in a court of competent jurisdiction, a complete and absolute divorce from the bonds of matrimony, and shall present the said B. P. Cobb a duly certified copy of the decree granting same; this being the consideration for which this note is given. If the said Ruth Cobb shall fail to secure said divorce within at least six months from 10 June, 1911, then this note shall be null and void. And the payees herein, in accepting this note, agree to the conditions above set out." Plaintiffs offered to show by the testimony of C. C. Pierce, one of the plaintiffs, that the writing on the back of the notes did not truly express the agreement, and that the real agreement was really one to pay alimony; he admitted, though, that he knew of the indorsement when he received the notes for Mrs. Ruth Cobb, and that it provided that the consideration of the notes was the divorce of the defendant, B. P. Cobb, from the bonds of matrimony, and while he protested against the insertion of the clause, he did not require that it should be stricken out, but received the notes and has brought this action upon them with the indorsement still there, and also that the understanding was that the notes should not be paid until the divorce was granted. The testimony of C. C. Pierce was tendered in these words: "Plaintiffs offer to prove a contradiction of the stipulation on the back of the notes, and that such proof will show a lawful consideration for the payment of support and alimony." At the close of the plaintiff's evidence, the court ordered a nonsuit, and plaintiffs appealed.

The objection was made that plaintiffs cannot maintain this action, because they are not the real parties in interest (Revisal, sec. 400), nor are they, within the meaning of the Revisal, sec. 404, "trustees of an express trust," and *Martin v. Mask,* 158 N. C., 436, was cited in support of the contention; but we need not decide that question, as we are satisfied that upon another ground the notes are void, and the nonsuit was properly entered. No contract which is against
(302) good morals or the public policy of the State will be enforced by its courts. If the consideration upon which it is based is illegal, the courts will leave the parties where it found them, and will lend their aid to neither of the parties. The law will give no sanction to a transaction which involves the violation of its principles, nor will it afford a remedy to compel either of the parties to perform its obligation. It was said in *Edwards v. Goldsboro,* 141 N. C., at p. 72: "The law gives no action to a party upon an illegal contract, either to enforce it directly or to recover back money paid on it after it has been executed. *Webb v. Fulchire,* 25 N. C., 485; *Warden v. Plummer,* 49 N. C., 524; 15 Am. and Eng. Enc. (2 Ed.), 997. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. The maxim is

ex dolo malo (or *ex turpi causa*) *non oritur actio,* and the kindred one is *in pari delicto potior est conditio defendentis.* In such cases the law leaves the parties where it finds them. When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief (*Wright v. Cain,* 93 N. C., 296), and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or when the contract is against public policy, or *contra bonos mores,* the courts will not enforce it in favor of either party. *York v. Merritt,* 77 N. C., 213; *ibid.,* 80 N. C., 285; *King v. Winants,* 71 N. C., 469; *Pinckston v. Brown,* 56 N. C., 494; *Sparks v. Sparks,* 94 N. C., 532." If the object of a contract is to divorce man and wife, the agreement is against public policy and void. The reason of this rule is that the law views with repugnance all contracts, the purpose or direct tendency of which, as gathered from its terms, is to dissolve the marriage tie, because of its regard for virtue, the good order of society, the welfare of the children as the fruit of the union, and the peculiar sanctity of the marital relation. The husband and wife cannot do by their consent what the law forbids to be done except by the legislative will, and then only in the way and by the method authorized. "The inducement of a wife to sue for a divorce by a promise on (303) the part of the husband to remunerate her for it, or for a husband and wife to agree that one of them shall bring a suit for a divorce and the other shall not defend, is against the law, which recognizes and upholds the sanctity of marriage, and is void. The same is true of an agreement, after a divorce has been granted, that the husband will pay the wife money if she will not move for a new trial, or, where the divorce has been wrongfully granted, that the parties will not disturb it. And an agreement not to sue or make claim for alimony has been held void. A promise to marry made by a man already married, to take effect when he has obtained a divorce from his present wife, is illegal and void." 9 Cyc., 519-520. All this will be found fully discussed in the books, and especially in the one just cited. It is such familiar learning that we need not make further comment upon it. *Archbell v. Archbell,* 158 N. C., 408.

The remaining question is, whether this contract is within the principle and the denunciation of the law. We think it will so appear by an examination of the indorsement on the notes. It stipulates that Mrs. Ruth Cobb shall obtain a divorce in the courts and that the notes are not to be payable until she has done so, and she is allowed only six months within which to secure the divorce. In other words, she must obtain a divorce as a condition of her right to have the money upon the notes, and she must do it quickly, or at least without any delay, the

penalty of which is the forfeiture of the money. She could not, under our procedure, obtain the divorce in shorter time than that fixed by the instrument. There is a clear and irresistible implication to be drawn from the terms of the written condition, that B. P. Cobb, the husband, will not resist or retard her recovery, but she was to have her own way. If we could consider the testimony of Mr. Pierce, it would appear that the object of this transaction, as we have stated it, was well understood by the parties, and so well was its legal effect appreciated that he protested against it, but did not have the illegal stipulation eliminated. It would also appear that the husband (304) was engaged in assisting his wife to procure evidence, the testimony of a lewd woman, to convict him of infidelity, so that a divorce *a vinculo* might be had, and a deposition for this purpose was actually taken and the name of another witness of unsavory reputation was furnished. But it is not necessary that the oral testimony should be further dwelt upon, as the instrument, we think, is void on its face, without any aid from extrinsic facts, and, besides, the offer to contradict or vary its terms was properly excluded from consideration in granting the nonsuit. This was not a proposal to show a parol agreement contemporaneous with and collateral to the written agreement, and also consistent with it, so that the two could well stand together in perfect harmony, but it was an attempt to overthrow the written contract and to substitute a new one in its place, the terms of which are not only repugnant to it, but utterly destructive of it. The rule is established that the collateral oral agreement must not contradict that which is written; but leaving it in full force, as expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out, so that it will appear in its completeness, the same as if all of it had originally been reduced to writing. *Evans v. Freeman,* 142 N. C., 61. In Clark on Contracts (2 Ed.), p. 85, the rule is thus expressed: "Where a contract does not fall within the statute, the parties may at their option put their agreement in writing or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitute one entire contract." The foregoing principles are fully discussed in *Cobb v. Clegg,* 137 N. C., 153; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Evans v. Freeman, supra; Woodson v. Beck,* 151 N. C., 144; *Walker v. Cooper,* 150 N. C., 129; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Walker v. Venters,* 148 N. C., 388; *Medicine Co. v. Mizell* 148 N. C., 384; some of the earlier cases being *Twidy v. Sanderson,* 31 N. C., 5; *Kerchner v. McRae,* 80 N. C., 219;

Braswell v. Pope, 82 N. C., 57, and *Terry v. R. R.,* 91 N. C., (305) 236, citing *Hawkins v. Lea,* 8 Lea (Tenn.), 42. In *Cobb v. Clegg, supra,* after stating the general rule that "when parties reduce their agreement to writing, it is a rule of evidence that parol testimony is not admissible to contradict, add to, or vary it, for although there may no law requiring the particular agreement to be in writing, yet the written memorial is regarded as the surest evidence," the Court further said that this rule did not apply where the writing is not, and was not understood to be, a memorial of the whole agreement, which is severable into parts, one of the parts only having been reduced to writing, for in such a case it is competent to show, by oral proof, the other part, if not in conflict with that which had been written, the oral part being but the complement or counterpart of the other. Even when the rule is properly understood, there will sometimes be difficulty in its application, as shown in the cases upon the subject, but we are quite sure that the evidence offered in this case falls within the rule of exclusion, as it plainly not only contradicts the written terms, but completely subverts them, or at least displaces them for another contract with different, if not opposite, stipulations. In *Moffitt v. Maness,* 102 N. C., 457, we are admonished that the salutary rule against the admissibility of parol testimony to vary the terms of a written instrument has, perhaps, been relaxed too much, the farthest limit having been reached, beyond which it is not safe to go. The Court sounds the alarm and warns us against the dangers ahead, which warning we should carefully heed, as we said in *Cobb v. Clegg, supra.* It is best to trust to the words of the writing, which the parties have chosen to protect and preserve the integrity of their treaty, than to rely on human memory for he exact reproduction of their words, for *Judge Taylor* said in *Smith v. Williams,* 5 N. C., 426: "The writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and notwithstanding the splendid eloquence of Cicero to the contrary, in his declaration for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright (306) mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact and leaves in the mind uncertain opinions, imperfect notions, and vague surmises." We must adhere strictly to the rule, which is of very ancient origin and has been accepted and highly regarded from the earliest to the latest periods of the law, as affording the safest ground for courts and juries to ascertain and settle contested rights, by requiring that formal writings, which bespeak solemnity and

deliberation in their preparation and execution, "shall be standing evidence against the parties entering into them," as it was put by *Justice Ashhurst* in 4 Term, 331. The solemn wills, deeds, and other writings by which we settle our estates and rights was once said to be the laws which private men are allowed to make for themselves and not to be altered, even by the King in his courts of law, and not in the court of conscience, except for fraud or mistake. *Lord Dyer,* in Plowden, 345. In two more recent cases the rule is considered with special reference to facts much like those now before us. *Sir William Grant* said, in 7 Vesey, 211: "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply"; and *Judge Chase* said in *O'Hara v. Hall,* 4 Dallas (U. S.), 340 (1 L. Ed., 858): "You may explain, but you cannot alter, a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity, and doubt upon the face of the instrument. But the proposition now is a plain case of alteration, that is, an offer to prove by witnesses that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has (307) been so adjudged in the Supreme Court, in *Clark v. Russell,* 3 Dal., 415. I grant that chancery will not confine itself to the strict rule, in cases of fraud and of trust; but we are sitting as judges at common law, and I can perceive no reason to depart from it."

The proposal here is to show a different contract, for the purpose, it is said, of purging the one which is evidenced solely by the writing of its illegal taint; but this will not do, as it plainly contravenes the rule of exclusion. If there was any mistake in expressing the true agreement, the party must resort to a different method for its correction, by which, perhaps, relief might be had, if the case appealed to the conscience of the court, which is, at least, doubtful. Defendant denies that the parties have failed to embody their agreement in the writing and relies upon the rule. The offer to change the aspect of the contract by oral proof has somewhat the appearance of an afterthought by the wife. The transaction has passed beyond the stage where any *locus penetentiæ* can be found to avail anything in her extremity. It is not what the man and his wife may now think would have been a better instrument for them or a more ingenious, though less ingenuous, form of expression, in view of the attack now made

upon the notes in suit, and certainly not what one of them may so think, but what they really have done, as shown by their written and not their spoken words. They entered into a contract forbidden by the law, and we can give no aid to its enforcement, but must affirm the judgment of nonsuit.

Affirmed.

Cited: Carson v. Ins. Co., post, 447; *Richards v. Hodges,* 164 N. C., 188.

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ADA DRAPER, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 February, 1913.)

1. Railroads—Negligence—Objects Upon Track—Observation of Engineer—Evidence.

When a railroad company is sued for damages for the negligent killing of the plaintiff's intestate, alleged to have been run over at night by the defendant's train, while he was lying drunk and helpless upon the track, and there is evidence on the part of defendant tending to show that the train could not have been stopped under 200 yards, and that the engineer could not have seen the intestate at that distance, owing to his position on the track, with an electric headlight, with which the locomotive was equipped, evidence is competent to show that a man standing on the track where the intestate was killed could have been seen a distance of 400 or 500 yards by the engineer, as a circumstance upon the question within what distance the engineer could have seen a man down upon the track.

2. Same—Stopping Train—Opinion—Harmless Error.

When the question at issue is whether the engineer on defendant railroad company's train could have stopped the train, at the speed it was then running, in less than 200 yards, or in time to have avoided the killing of plaintiff's intestate from the time he could have been seen down on the track by the electric headlight of the locomotive, it is incompetent for witness of the plaintiff to testify that a passenger train could have been stopped in 75 yards, unless this testimony were based on the facts in evidence as to the speed of the train, its length and weight, and the condition of the track; but held harmless error in this case, as the witness further testified that he knew nothing of the distance it would take a train, such as the one in evidence, to stop, under the existing conditions and circumstances.

3. Same.

When in an action to recover of a railroad company damages for the alleged negligent running over and killing of plaintiff's intestate the

question at issue was the distance within which the train could, under the circumstances, have been stopped, it was competent for plaintiff's witness to testify that this could have been done within 200 yards, especially when the defendant was endeavoring to establish that fact, as in this case.

4. Same—Positive Evidence—Instructions.

The testimony of defendant railroad company's engineer as to whether he could discover the plaintiff's intestate down upon the track in time for him to have stopped the train under the circumstances to avoid the injury complained of, and that of plaintiff's witness in contradiction, are of the same character of evidence, and it was not an error in the court to refuse to instruct the jury that the engineer's testimony was positive and that plaintiff's witness was not positive, the only difference between the two being that the jury may consider the better opportunity of the engineer to know.

5. Appeal and Error—Exceptions—Assignments of Error.

An assignment of error to the charge of the court to the jury to which there is no exception in the case on appeal will not be considered.

6. Measure of Damages—Instructions—Charge as a Whole—Harmless Error.

The judge in his charge to the jury upon the measure of damages for the negligent killing of plaintiff's intestate instructed them that they could award $500, $2,000, or any amount they concluded was right, basing their findings upon the evidence in the case as they saw it, not exceeding the amount demanded: *Held*, this charge furnished no rule for the admeasurement of damages, and standing alone was erroneous, but considered with the other parts of the charge in this case, which, taken as a whole, gave the correct rule of damages, was not reversible error.

7. Railroads—Negligence—Down on Track—Burden of Proof.

In an action to recover damages for the negligent killing of plaintiff's intestate by a train of the defendant railroad company, while the intestate was down and helpless on the track, the burden is on the plaintiff to establish three facts: (1) That the intestate was killed by the defendant's train; (2) that the intestate was down on the track in an apparently helpless condition; (3) that the defendant, by the exercise of ordinary care, could have discovered the intestate in time to stop the train and avoid the killing.

8. Same—Evidence—Stopping Train—Ordinary Care—Questions for Jury.

In an action to recover of a railroad company damages for negligently killing the plaintiff's intestate at night, it was admitted that it was the defendant's train that killed him; there was evidence that he was down and helpless on the track; and as to whether the defendant's engineer used ordinary care in stopping the train in time to avoid the killing, defendant's engineer testified the train could have been stopped within 200 yards, and that he discovered the object upon the track to be a man when 160 yards distant. It was also in evidence that a man standing could be seen by the aid of the electric headlight on the engine a distance of 400 or 500 yards: *Held*, it was a question for the jury to decide whether the engineer, in the exercise of ordinary care, could have

discovered the object down on the track more than 200 yards away, and that he could have stopped the train in time to avoid the killing, after he had discovered it was a man.

9. Same—Opinion Evidence.

In an action for damages for the negligent killing of plaintiff's intestate, who was down and helpless on the track and thus run over by the defendant railroad company's train, involving the question as to whether the engineer, by the exercise of ordinary care, could have stopped the train in time to have avoided the killing, the jury are not bound by the opinions of the witnesses as to the distance within which the train could be stopped, and may consider the evidence of the condition of the track, the grade, the length and weight of the train, the speed, and other relevant circumstances in connection with these opinions, and from the whole evidence determine within what distance it could have been stopped.

APPEAL by defendant from *Webb, J.*, at August Term, 1912, of (310) NORTHAMPTON.

This action is to recover damages for the alleged negligent killing of the plaintiff's intestate.

It was admitted at the trial that, in the early morning of 1 July, 1911, at 3:25 o'clock, while it was very dark, the plaintiff's intestate laid down on his back upon the defendant's track between Weldon and Garysburg, and was in this position when he was stricken and killed by defendant's train.

It was also admitted that the track was straight from Weldon to the point where the intestate of plaintiff was struck, a distance of a mile and up grade, and that the train was going from Weldon to point and beyond where plaintiff's intestate was hit, and that defendant's said passenger train ran over and against the plaintiff's intestate; that said train was equipped with the best electric headlight, and that plaintiff's intestate died in a short time after the accident as a result of his injuries.

It was in evidence that the intestate was very drunk, and that he was inquiring for a place to sleep a short time before he was killed.

The train consisted of the engine, a baggage car, an express car, and four heavy Pullmans, and the body was found, after the killing, under the first truck of the second car from the engine.

It was a clear night, the track was straight, the train was moving slightly up grade at a speed of 30 or 40 miles an hour, and there was evidence that the electric headlight would enable the engineer to see a man standing up 400 or 500 yards. The train was (311) equipped with the best appliances, and the engineer testified that he discovered a man was on the track when 165 yards distant, and that

he could stop the train in the "neighborhood of 200 yards"; that 200 yards was "as near as he could stop it."

He also testified that when he first saw the object, he knew it was a man; that his body was in the center of the track, with his legs over the right-hand rail, and that the body was not concealed, but was a little lower.

The conductor testified, among other things, that a man could be seen about 200 yards on the track.

There was evidence on the part of the defendant that the train was properly equipped; that a careful lookout was maintained; that the intestate could not have been seen a greater distance than 165 yards, that the train could not have been stopped in less than 200 yards.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. E. Daniel, Peebles & Harris, and Gay & Midgette for plaintiff.
Mason, Worrell & Long and F. S. Spruill for defendant.

ALLEN, J. There are several exceptions to evidence, none of which require extended discussion.

It was competent to prove that a man standing could be seen with an electric headlight 400 or 500 yards, for the purpose of showing the force of the headlight, as a circumstance upon the question within what distance the engineer could see a man down on the track, and it also appears that this fact was not in dispute, as a witness for the defendant testified: "How far you can see an object on the track with an electric headlight depends on how the object is. The size of a man standing up, you could see 400 or 500 yards."

The question asked the witness for the plaintiff, "How far would you say, then, that it would take to stop a passenger train after it began to stop?" and his answer, "Seventy-five yards," ought to have
(312) been excluded, unless it is assumed that the question and answer were based on the facts in evidence as to the speed of the train, its length and weight, and the condition of the track; but the whole evidence of this witness shows that the opinion he expressed could not have influenced the verdict.

He said on cross-examination, "that he had seen trains stop with emergency air-brakes, but he could not give an instance nor had he ever measured the distance from the application of the brake to the stopping place of the train. The train upon which he saw the emergency brakes applied was a light Seaboard train, running not over 20 or 25 miles an hour, and he knew nothing at all about how long it would take the emergency air-brakes to stop a heavy Pullman train,

running 30 or 40 miles an hour. He had never ridden on an Atlantic Coast Line train."

The answer of the witness for the plaintiff, that the train which killed the intestate, properly equipped, and at the speed it would attain from Weldon to the place of the killing, could be stopped within 200 yards, was competent, but if not, this was a fact the defendant was endeavoring to establish, and the engineer and the conductor testified that the train could be stopped within 200 yards.

The eleventh exception is to the failure to charge that the evidence of the engineer as to when he did or could discover the intestate was positive evidence, while the testimony of the plaintiff's witness on this question was not positive. The form of the prayer for instruction shows the difficulty confronting the defendant's counsel. He was endeavoring to contrast positive and negative testimony, and while he asserted that the evidence of the engineer was positive, he was not willing to commit himself to the statement that the evidence of the plaintiff's witness was negative.

We fail to see the distinction attempted to be drawn, and are of opinion that the evidence of an engineer that he could or could not have discovered within a certain distance, belongs to the same class with that of another witness, who testifies to the same fact, and that the only difference between the two is that the jury (313) may consider the better opportunity of the engineer to know.

The thirteenth assignment of error cannot be considered, because it is based on alleged error in a part of the charge, to which there is no exception in the case on appeal. *Worley v. Logging Co.*, 157 N. C., 498.

The fourteenth assignment of error is to the concluding sentence in the charge on damages: "You have a right to give this man $500, $2,000, or any amount that you may come to the conclusion that he is entitled to recover, basing your findings upon the evidence in the case as you see it, not exceeding $2,000."

Standing alone, this charge would be objectionable, because it furnishes no rule for the admeasurement of damages, but it must be considered in connection with other parts of the charge, and immediately before the sentence quoted the court charged the jury, clearly and at length, as to the correct rule of damages, to which no exception was taken.

This disposes of the exceptions relied on in the brief of the defendant, except those relating to the motion to nonsuit.

The burden was on the plaintiff to establish three facts:

1. That the intestate of the plaintiff was killed by the train of the defendant.

2. That at the time of the killing the intestate was down on the track in an apparently helpless condition.

3. That the defendant, by the exercise of ordinary care, could have discovered the intestate in time to stop the train and avoid the killing.

The first fact was admitted, and there was ample evidence to sustain a finding in favor of the plaintiff on the second. The third was in more doubt, and while we think, on the whole evidence, the jury might have found this in accordance with the contention of the defendant, we cannot say there is no evidence to support a finding in favor of the plaintiff.

According to the evidence of the defendant, the train could be stopped within 200 yards, and the engineer testified that he discovered it was a man on the track when 165 yards distant. It was also in evi-
(314) dence that a man standing could be seen by the aid of the electric headlight 400 or 500 yards.

If so, was it not a reasonable inference that the engineer could have discovered that there was an obstruction on the track more than 200 yards away, and that if he had then gotten the train under control he could have stopped it in time to avoid the killing, after he discovered it was a man?

Again, the jury was not bound by the opinion of witnesses as to the distance within which the train could be stopped, and had the right to consider the evidence of the condition of the track, the grade, the length and weight of the train, the speed and other relevant circumstances in connection with these opinions, and from the whole evidence to determine within what distance it could be stopped. *Wright v. R. R.*, 127 N. C., 226; *Davis v. R. R.*, 136 N. C., 117.

If so, there was evidence that the train could be stopped in less than 200 yards, and in time to avoid the killing.

The motion for judgment of nonsuit was properly overruled, and on the whole case we find no reversible error.

No error.

Cited: Hanford v. R. R., 167 N. C., 278; *Gray v. R. R. ib.*, 436; *Hopkins v. R. R.*, 170 N. C., 486, 487.

(315)

GRACE CHURCH ET AL. v. W. W. ANGE.

(Filed 12 February, 1913.)

1. Wills—Interpretation—Rectory—Trusts and Trustees—Powers of Sale—Interpretation of Statutes.

A testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," etc.: *Held*, the language used, that the property "shall not be disposed of, sold, or used in any other manner," etc., manifested an intention to effectuate the trust, and to permit a sale if the purpose declared would be promoted thereby; and, further, if the power to sell and reinvest in other lands suitable for a rectory is not contemplated by the will, it is not forbidden, and may be done under section 2673 of the Revisal.

2. Equity—Charitable Uses—Failure of Use—Unforeseen Events—Devises—Powers of Sale.

Courts of equity have jurisdiction to sell property devised for charitable uses where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale.

APPEAL from *Bragaw, J.*, from judgment rendered by consent at chambers, 20 December, 1912, from WASHINGTON.

This is a controversy submitted without action on the following statement of facts:

SECTION 1. That Clarence Latham, and the other individual plaintiffs named above, constitute the wardens, vestrymen, and trustees of Grace Church, of Plymouth, N. C., and are authorized by law to sell and convey real estate belonging to the said church. That the said church is an organization with those powers and rights as prescribed in sections 2672, 2673, etc., of Revisal.

SEC. 2. That Mrs. M. F. Spruill, who died on or about .... March, 1881, left a last will and testament, which said will was regularly executed and properly probated and docketed in Washington County; a copy of the only material parts of said will is hereto annexed and made a part hereof.

SEC. 3. That those lots in the town of Plymouth, mentioned in item 6 of said will, to wit, parts of lots 158, 159, 160, 161, had standing thereon, at the time said will took effect, a residence of the testatrix together with her furniture and household effects, and that she owned same in fee simple.

SEC. 4. That immediately after the death of the testatrix, the said Grace Episcopal Church took possession of the said four lots mentioned, to wit, in 1881, and used same for the purpose of rectory or residence for the ministers of said church.

SEC. 5. That in 1886, or thereabout, the dwelling-house on said lots was destroyed by fire, and ever since said time there has been no residence on said lots. The said church, however, has held actual, quiet, continuous, and notorious adverse possession of said lots since said date until the present time, claiming said parcel of land as its own.

SEC. 6. That the location of said lots is such that a residence could not be satisfactorily used thereon; said lots lying in close proximity to the freight depot and yards of a railroad company, and being (316) totally unfit for residential purposes.

SEC. 7. That it is the purpose of the plaintiffs to sell said lots and use the proceeds arising therefrom for the purpose of buying a rectory and residence for the ministers of the said church at a more proper and suitable location. That said plaintiffs contend that, under the provisions of section 6 of said will, they have a right to so convey said property, the funds arising therefrom to be used for the purpose above mentioned.

SEC. 8. That the plaintiffs contend that they are the owners in fee simple of said property, and have a right to convey same in fee simple.

SEC. 9. That the plaintiffs, being properly authorized so to do by said church, and acting within the scope of their power, have agreed to sell and the defendants have agreed to purchase the said four lots mentioned in item 6 of the said will, at the price of $1,100. That the plaintiffs have tendered deed, and the defendant has refused to accept same on the ground that plaintiffs cannot convey a good title, in fee simple, for the said four lots.

SEC. 10. That it is agreed that, in the exercise of good judgment, it would be wise for the plaintiffs to sell said land, and to build or buy a rectory at a more suitable location for the same.

SEC. 11. By consent, judgment herein may be rendered in vacation.

Wherefore, it is prayed that if the court be of the opinion that plaintiffs can make a good title, that it so adjudge, and that defendant be required to pay the purchase price and take deed; if, on the other hand, the court be of the opinion that plaintiff cannot make a good title, that it so adjudge.

WILL OF MRS. SPRUILL.

"ITEM 6. I give and bequeath and devise the upper parts of lots No. 158, 159, 160, and 161, in the town of Plymouth, lying on the south side of Water Street, together with all of the furniture, books, portraits works of art, plate, silverware, apparel, privileges and appurtenances thereunto in any wise belonging, to the wardens, vestry, (317) and trustees of Grace Episcopal Church of Plymouth, N. C., and the members of said congregation, it being Protestant Episcopal

Church, in the diocese of North Carolina, and their heirs and successors in office, to be by them held as a rectory or residence for the ministers of said church, and I hereby will and declare that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated in this clause of my will.

"ITEM 7. I give and devise to the said wardens and vestry and trustees of said church and the members of the said congregation, and their heirs and successors in office, the water part of lot No. 148, and my two-thirds of the upper part of said lot in the town of Plymouth to be held, used, and enjoyed and disposed of by them for benefit of said church."

Judgment was rendered in favor of the plaintiffs, and defendant excepted and appealed.

S. B. Spruill for plaintiffs.
W. M. Bond, Jr., for defendant.

ALLEN, J. The will under consideration contains no restraint upon alienation that the law would not have imposed upon the declaration of trust in favor of Grace Church, as the property is devised in trust, and, in the absence of a power conferred by the will, could not be sold for any other purpose than the one designated, and the language used can have no legal signification except to confer the power to sell.

The language, the property "shall not be disposed of, sold, or used in any other way or for other purpose than the one designated in this clause of my will," manifests an intention to effectuate the trust, and to permit a sale if the purpose declared, of providing a rectory, can be thereby promoted; but if this power to sell and reinvest in other land, suitable for a rectory, is not contemplated by the will, it is not forbidden, and under the statute, Revisal, sec. 2673, the plaintiffs can sell.

If, however, this was doubtful, the sale in this case has the sanction of the court, and courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale. *Lockland v. Walker,* 52 N. W., (318) (Mo.), 427; *Brown v. Baptist Society,* 9 R. I., 184; *Stanly v. Colt,* 72 U. S., 119; *Jones v. Habersham,* 107 U. S., 183.

In the last case, the Court said of an express provision against alienation: "It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purposes of the trust. Tudor on Charitable Trusts (2d Ed.), 298; *Stanly v. Colt,* 5 Wall., 119, 169."

We are of opinion that the sale is valid, and the judgment of the Superior Court is

Affirmed.

Cited: College v. Riddle, 165 N. C., 217; *Fisher v. Fisher,* 170 N. C., 381.

GEORGE WINDLEY, ET ALS., TRUSTEES, v. HARMON MCCLINEY ET ALS., TRUSTEES.

(Filed 19 February, 1913.)

1. **Religious Denominations—Free-Will Baptist—Independent Government—Majority Rule.**

The colored "Free-Will Baptist Church" at Pantego, like all other Baptist churches, is congregational in its church polity. Each congregation is independent in government, and a majority of its members control.

2. **Same—Church Polity—Conference—Injunction—Rights of Members.**

A "Free-Will Baptist Church" held its property under a deed made to its trustees in that name. The congregation of this church united with other churches in an annual conference known as "United American Free-Will Baptist," which adopted a certain discipline at one of the conferences, which was subsequently revised, but there was a division, and at the next conference those churches which had voted to reject the revision were denied a seat in the conference. Thereafter the members of this church by a divided vote adopted the conference revision, whereupon the minority withdrew and chose another pastor. Subsequently the majority of the congregation of the church elected trustees for the property, and chose a pastor. It appeared that there was no difference in doctrine or denominational creeds. In an action to enjoin the majority faction from worshiping in the church building, owned by the congregation, it is *Held*, the congregation had a right to join the conference and adopt its discipline, but this did not destroy their individuality and independence as a congregation, and that neither faction had the authority to exclude the other from worshiping in the church, the ownership of the church building being in the whole membership, its use controlled under the majority rule.

(319) APPEAL from Beaufort, heard before *Bragaw, J.,* at chambers, 18 December, 1912.

The facts are sufficiently stated in the opinion of the Court by MR. CHIEF JUSTICE CLARK.

Daniel & Warren and R. T. Martin for plaintiffs.
Ward & Grimes for defendants.

CLARK, C. J. The plaintiffs, representing 55 of the membership of the colored Free-Will Baptist Church at Pantego, brought this action against the defendants, representing 105 of said membership, to restrain

them from worshiping in the church building which was owned by the congregation. The case in its general features nearly resembles that of *Conference v. Allen,* 156 N. C., 524, which is decisive of this case.

This church, like all Baptist churches, was congregational in its church polity and each congregation is independent in government, and a majority of its members control. The judge finds as facts that this and other colored Baptist churches of that section united in an annual conference known as "United American Free Will Baptist" Church, and adopted a discipline; that in one of these conferences held in 1908 there was a revision of the discipline, on which subject there was a division, and at the next conference those churches which had voted to reject the revision were denied a seat in the conference. That subsequently, at a quarterly meeting of the Pantego Church, 30 August, 1912, being the regular annual meeting for the election of a minister for said church, Rev. John Windley was elected pastor by a vote of 105 to 55, and at the same time the congregation voted to adopt the revised discipline. Thereupon the minority (whom the plaintiffs in this case represent) withdrew and chose another pastor. Subsequently, in October, 1912, the congregation by a vote of 105 elected a board of trustees, who are the defendants in this action, together with the pastor, said (320) Rev. John Windley. The judge further finds as facts that "neither the General nor Annual Conference of the United American Free-Will Baptist Church (with which the defendants affiliate), nor the Annual Conference of the Free-Will Baptists (with which the plaintiffs affiliate) has any control or governmental authority over the individual congregation, but that each congregation owns its own property, elects its own pastor, trustees, and other officers. That this church property at Pantego was purchased by the congregation collectively, without any assistance from any organization of any denomination." He further finds that the disciplines adhered to respectively by the plaintiffs and defendants "are not essentially different in doctrine and do not represent different denominational creeds; that the said denomination is not controlled by a bishop, but is congregational and the annual conferences are merely an association of churches for the purpose of joining their efforts for general church work, but that the individual churches, with respect to their local work and local self-government, are independent; that since the election on 30 August, 1912, and the withdrawal of the minority (55 members), the names of those withdrawing have been dropped from the roll of the Pantego Church, no effort having been made by the minority to participate in the meetings of the majority remaining at the time of the withdrawal." Upon the above findings the court dissolved the restraining order and held that the defendants were entitled to

the free and unrestrained use of the church building, but that his judgment should not be construed as restraining the plaintiffs or any other members of the congregation from attending the regular religious services held by the majority members of the congregation.

If it had appeared that there had been a change in church doctrine or in church polity, so material as to make the holding of the church by the defendants in effect a transfer to another denomination, a very different question would have been presented (*Nash v. Sutton,* 117 N. C., 233) which we are not now called upon to decide. It is true that the deed for the church property was made to the trustees of the "Free-Will Baptist Church (Colored)," but subsequently thereto,
(321) in 1890, this congregation united with other churches and changed their designation to the "United American Free-Will Baptist Church." In 1908 there was a revision of the discipline, for which the delegate of Pantego Church voted, and the majority of its members by vote indorsed that action. The majority, 105 in number, are in possession of the church and are represented by the defendants in this action. The minority, consisting of 55, objecting to the revision and styling themselves simply the "Free-Will Baptist Church," are claiming to control because this was the original designation of the church at the time the deed was made. This is the point in the controversy.

It is true that the deed was made to "Trustees of the Free-Will Baptist Church of Pantego"; but the congregation had the right to join an annual conference or association styling itself "United American Free-Will Baptist," and to adopt a discipline prescribed by such conference. This did not destroy their individuality and independence as a congregation nor cause them to cease to be "The Free-Will Baptist Church of Pantego." Indeed, the prefix "United American" before the words "Free-Will Baptist" simply showed an association of the churches of the latter order. The congregation voted to join that conference in 1890, and adopted its discipline without any division. The controversy over the revision of that discipline the judge finds was not as to a matter causing an essential or material change in church doctrine. On examination of the discipline sent up in the record, we are of opinion that the revision does not change in any way the identity of Pantego Church. It is still, as styled in the deed, "The Free-Will Baptist Church" of Pantego.

The plaintiffs asked the court below to exclude the 105 members. The judgment excludes neither the 105 represented by the defendants nor the 55 represented by the plaintiffs, but permits all to attend, and recognizes the ownership and control of the church as being in the whole membership, and that their will must be determined by the majority.

Affirmed.

(322)

G. W. MITCHELL v. V. H. FREEMAN.

(Filed 19 February, 1913.)

Limitations of Actions—Parol Contract to Convey—Acts of Ouster—Deeds and Conveyances.

The statute of limitations does not begin to run in favor of one who has entered into possession of lands under a parol contract to convey and who has never paid any part of the purchase price, until after some act on his part showing that he is holding it adversely to the owner; and in this case it appearing that no such act had been done prior to a recent conveyance, made within a year next before the commencement of the action, the plea is not available.

APPEAL by defendant from *Cline, J.*, at the April Term, 1912, of BERTIE.

L. L. Smith for plaintiff.

Winborne & Winborne, Murray Allen, and Winston & Matthews for defendant.

CLARK, C. J. The plaintiff sold the land in controversy, 20 acres, to J. B. Ruffin for the sum of $60 upon a parol conditional sale under which he entered into possession in 1882. In March, 1909, the children of J. B. Ruffin, he being dead, conveyed a tract of land to the defendant Freeman, within the boundaries of which were embraced the 20 acres in controversy. There are several exceptions, but the only one that requires consideration is the defense of the statute of limitations.

The plaintiff executed no conveyance or written agreement to convey to J. B. Ruffin or his heirs. Ruffin entered into possession under a parol agreement to pay the purchase money. No part of this has been paid, nor has there been any offer to pay, though the plaintiff is willing to accept the same with interest thereon. There is no evidence of any adverse possession until the conveyance to the defendant in March, 1909, and this action was begun in September of that year. The plea of the statute could not avail the defendants.

No error.

(323)

A. H. STEPHENS v. L. B. MIDYETTE.

(Filed 26 February, 1913.)

1. **Lessor and Lessee—Statute of Frauds—Assignment of Lease—Time of Possession—Parol Evidence.**

Where there is a written lease of land for five years, and the lessee assigns it in writing for the remaining term of three years, possession to be delivered on demand, parol evidence is competent to show the time the transfer was to take effect, it appearing that the demand was made at the time testified to, and the evidence being explanatory of, and not contradicting, the written agreement.

2. **Lessor and Lessee—Statute of Frauds—Assignment of Lease—Seal.**

The written assignment on a lease of lands for more than three years is not required to be under seal, by our statute, Revisal, 976.

3. **Statute of Frauds—Pleadings—Demurrer—Evidence—Objections and Exceptions.**

The statute of frauds must be pleaded, unless title is denied, and it cannot be made available by a demurrer or an objection to evidence.

4. **Lessor and Lessee—Leases—Statute of Frauds—Written Assignment—Registration.**

The written assignment of a registered lease of lands for more than three years is not required to be registered under our statute.

APPEAL by defendant from *Daniels, J.*, at December Special Term of PAMLICO.

D. L. Ward for plaintiff.

A. D. Ward and H. L. Gibbs for defendants.

CLARK, C. J. The defendants leased to W. J. Moore the land in question for the five years, 1909-1913, inclusive. Said Moore cultivated the land for two years. On 12 November, 1910, Moore assigned the lease to the plaintiff in writing as follows: "I herewith transfer to A. H. Stephens my lease on the Midyette farm for the remaining term of three years. Said lease to be delivered upon demand."

Objection was made that the assignment was not under seal. The plaintiff Stephens was also allowed to testify over objection that (324) it was agreed at the time that the transfer should take effect on 1 January, 1911. This did not contradict the writing, because it was specified therein that the assignment was for the "remaining three years." It was in evidence also that the demand was made, in pursuance of the written assignment, on 1 January, 1911. Besides, if the assignment had taken place 12 November, it specified that it was for "the remaining *three* years." The evidence was not contradictory

of the written agreement, but was explanatory and indeed in pursuance of its evident meaning.

Revisal, 976, requiring leases for more than three years to be put in writing, does not require the use of a seal on an assignment. Moreover, the statute of frauds was not pleaded nor contract denied, and an objection on that ground can only be taken by answer, and not by a demurrer or objection to evidence. *Williams v. Lumber Co.*, 118 N. C., 928; *Hemmings v. Doss*, 125 N. C., 402.

The assignment, even of a mortgage, is not required to be registered. *Williams v. Brown*, 127 N. C., 51.

No error.

(325)

J. E. BRADY v. R. B. BRADY.

(Filed 19 February, 1913.)

1. Actions—Transitory and Local—Distinction.

Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place, the distinction being in the nature of the subject of the injury, and not in the means used, or the place at which the cause of action arose.

2. Actions—Realty—Severed Trees—Personalty—Courts—Jurisdiction.

When the cause of action is for a certain sum of money, the proceeds of sale of timber, in the hands of one who is within the jurisdiction of our courts, which had been cut from lands claimed by the plaintiff located in another State, and there is nothing in the complaint which would entitle him to recover, here or elsewhere, damages for injury to the lands, the action is transitory, and may be maintained in our courts.

3. Same—Pleadings—Trespass—Conversion—Election.

The owner of lands from which trees growing thereon had been wrongfully cut by another, and thus severed from the realty, may elect to sue for the recovery of damages to the land, but he must allege trespass, or he may waive the trespass, consider the trees severed as personalty, and sue for the wrongful conversion or wrongful carrying away of the trees, and recover their value.

4. Same—Code Practice—Forms of Action.

The owner of lands situated in our jurisdiction may waive his right to an action *quare clausum fregit* and bring his action here to recover the proceeds of the sale of trees which had been severed and converted here, under our Code system, which abolishes forms of action, and looking to the substance, requires only a simple, concise statement of the facts, and affords the party the relief to which he is entitled thereon.

5. Pleadings, How Construed—Prayers for Relief—Practice.

A pleading is liberally construed to obtain substantial justice between the parties, and if it can be seen from its general scope that a party has a cause of action, although not stated with technical accuracy, it will be sustained.

APPEAL from *Webb, J.*, at Fall Term, 1912, of HERTFORD.

This action is to recover $900 in the possession of the defendant Bridger.

The plaintiff alleges, in substance, that he is the owner of a tract of land in Virginia; that the defendant R. B. Brady has sold the timber on said land, and has caused the same to be cut and removed; that $900 of the money paid for the timber is now in the possession of the defendant Bridger, as attorney for the defendant Brady, and that he has made demand for said money, which has been refused.

There is no allegation of an unlawful entry upon said land, nor that the cutting and removal was wrongful, and the plaintiff does not ask to recover damages to the land, but that he recover said sum of $900.

When the action was called for trial it was dismissed on the (326) motion of the defendant, upon the ground that the courts of this State did not have jurisdiction thereof, and the plaintiff excepted and appealed.

Winborne & Winborne and Murray Allen for plaintiff.
Smith & Banks and R. L. Bridger for defendants.

ALLEN, J. If the cause of action set out in the complaint is local, the courts of Virginia alone have jurisdiction of it, and if transitory, the action may be maintained in this State.

Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place. The distinction exists in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises. *Mason v. Warner,* 31 Mo., 510; *McLeod v. R. R.,* 58 Vt., 732; *Perry v. R. R.,* 153 N. C., 118.

The subject of the injury complained of by the plaintiff is the refusal by the defendants to surrender to him money, the proceeds of the sale of certain timber, which he alleges belonged to him, and there is nothing in the complaint which would entitle him to recove, here or elsewhere, damages for injury to the land. He does not allege an unlawful and wrongful entry or other trespass upon the land, nor that the land was injured, and contents himself with a statement of a cause of action for money in the hands of the defendants in this State.

We have said recently, in *Williams v. Lumber Co.,* 154 N. C., 309: "If one entered upon the land of another and cut trees thereon, the

owner of the land and of the trees had his election at common law to sue in trover and conversion or in trespass *de bonis asportatis* for the value of the trees, or in trespass *quare clausum fregit* for injury to the freehold, the land, or to the possession of it," and the first two of these actions are transitory, and the last local.

If the owner elects to sue for the recovery of damages to the land, he must agree a trespass, but can waive the trespass, consider the trees as personalty after severance from the land, and sue for the wrongful conversion or wrongful carrying away of the trees, in which event he would recover their value.

The reason the action *quare clausum fregit* is local is that the injury to the land can only be done on the land, and the other actions are transitory because the trees, after severance, may be carried (327) away and converted elsewhere.

The question has arisen in other jurisdictions and has been decided in accordance with these views.

In *McGonigle v. Atchison,* 33 Kan., 726, the plaintiff sued in the courts of Kansas to recover damages for the removal of sand from land in Missouri and the Court, discussing the right to maintain the action, said: "If the facts show a cause of action in the nature of trespass *de bonis asportatis,* or trover, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit,* then the action is admittedly local. . . . He (the plaintiff) seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the *value* of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit;* but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis,* and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory. . . . When the sand was severed from the real estate, it became personal property, but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand, and had the right to follow it and reclaim it, into whatever jurisdiction it might be taken. He could recover it in an action of replevin (*Richardson v. York,* 14 Me., 216; *Harlan v. Harlan,* 15 Pa. St., 507; *Halleck v. Mixer,* 16 Cal., 574); or he could maintain an action in the nature of trespass *de bonis asportatis,* for damages for its unlawful removal (*Wadleigh v. Janvrin,* 41 N. H., 503, 520; *Bulkley v. Dolbeare,* 7 Conn., 232); or he could maintain an action in the nature

of trover, for damages for its conversion, if it were in fact converted. *Tyson v. McGuineas,* 25 Wis., 656; *Whidden v. Seelye,* 40 Me., 247, 255, 256; *Riley v. Boston W. P. Co.,* 65 Mass., 11; *Nelson v. Burt,* (328) 15 Mass., 204; *Forsyth v. Wells,* 41 Pa. St., 291; *Wright v. Guier,* 9 Watts, 172; *Mooers v. Wait,* 3 Wend., 104; or he could maintain an action in the nature of *assumpsit* for damages for money had and received, if the trespasser sold the property and received money therefor. *Powell v. Rees,* 7 Ad. and L., 426; *Whidden v. Seelye,* 40 Me., 255; *Halleck v. Mixer,* 16 Cal., 574."

In *Tyson v. McGuineas,* 25 Wis., 658, the Court said of a cause of action to recover damages in the courts of Wisconsin for the cutting of trees on lands in Michigan: "The cause of action stated in the complaint is for appropriating and converting by the defendants, to their own use, three million feet of pine timber and sawlogs, the property of the plaintiffs. To sustain this cause of action, various witnesses were sworn upon the part of the plaintiffs, who gave evidence tending to show that these logs were cut upon lands belonging to them in Michigan. But the cause of action relied on is manifestly not trespass to the realty. It is not claimed that there can be any recovery for damages to the real estate in this action. But it is said, in answer to the objection that the action is local, that as soon as the trees and timber were severed from the realty, they became personal property, and that trover will lie against any one removing and converting them. The authorities cited by the counsel for the plaintiffs certainly establish the principle that when the trees on the plaintiffs' land were severed from the freehold and carried away, they became personal property, and that an action of trover might be maintained for their value. *Whidden v. Seelye,* 40 Me., 247; *Moody v. Whitney,* 34 *ib.,* 563; *Pierrepoint v. Barnard,* 5 Barb., 364; *Sampson v. Hammond,* 4 Cal., 184, and cases there cited. It must be admitted that trover is a transitory action, and may be maintained in this State for a conversion of personal property in another State. *Whidden v. Seelye, supra; Glen v. Hodgen,* 9 Johns, 66; 1 Chitty Pl., 269; Gould Pl., ch. 3."

In *Whidden v. Seelye,* 40 Me., 255, the plaintiff sued in the courts of Maine to recover damages for cutting and removing timber from lands in New Brunswick, and the Court said: "The trees on the plaintiff's land, when severed from the freehold and carried away, became personal property, and his title thereto was not divested by the wrongful (329) acts of the defendant. . . . When there has been a severance of what belongs to the freehold, and an *asportation,* the action of trover may be maintained. 3 Stephens N. P., 2665. The title to the property severed remains unchanged and the owner may regard it as

personal property and maintain replevin. *Richardson v. York,* 14 Me., 216. So, the tort being waived, if the property severed has been sold, the action of *assumpsit* may be maintained. . . . The jury have found that the plaintiff was in possession of the mortgaged premises and that the defendant cut thereon the logs in controversy. The logs having been severed from the freehold, and after such severance being personal property, and having been carried away and converted by the defendant to his own use, trover is the fitting and appropriate form of action in which to recover the damages resulting from their conversion. It is a transitory action and may be maintained in this State for a conversion of personal property in a foreign jurisdiction."

It thus appears that the plaintiff could maintain this action under the forms of action at common law, and if so, his right to do so cannot be doubted under a system like ours, which has abolished forms of action, and, looking only to the substance, requires a simple, concise statement of the facts, and affords the party the relief to which he is entitled upon the facts.

Pleadings are now construed liberally, with a view to substantial justice between the parties, and if it can be seen from their general scope that a party has a cause of action, although not stated with technical accuracy, the pleading will be sustained. *Stokes v. Taylor,* 104 N. C., 395; *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 471.

The cases of *Cooperage Co. v. Lumber Co.,* 151 N. C., 455, and *Perry v. R. R.,* 153 N. C., 117, are not in conflict with this position, because in each the cause of action was to recover damages for injury to the land.

Being of opinion, therefore, that the cause of action stated in the complaint is to recover the value of the trees and is transitory, we hold that it can be maintained in this State.

Reversed.

Cited: *Cedar Works v. Lumber Co., post,* 610.

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(330)

J. S. NORMAN v. EAST CAROLINA RAILWAY COMPANY.

(Filed 5 March, 1913.)

1. Carriers of Passengers—Tickets—Receipts—Presumptions—Evidence.

A railroad ticket is in the nature of a receipt to the passenger for his railroad fare to his destination, and is evidence to the proper agents of the company that the bearer is entitled to be carried by the company issuing it.

2. Same—Contracts—Consideration.

Where a passenger of a railroad company purchases from its ticket agent at its station the usual ticket to his destination, the ticket is *prima facie* evidence that the holder has paid the consideration or the regular price for it, which entitled him to be accordingly transported by the company.

3. Carriers of Passengers — Tickets — Stipulations — Notice—Consent—Contracts—Consideration.

The purchaser of a ticket of a railroad company by paying the usual charges therefor in the usual way is entitled to have a valid ticket given him by the company's agent, and, in the absence of evidence of his assent prior to or at the time of the purchase, he is not bound by a stipulation on the ticket rendering it invalid, for such provision would be without consideration.

4. Same—Station Stamp—Unreasonable Rules.

A ticket of a railroad company, reading "Station stamped on back, to station opposite point in margin below; good for one passage, etc.," does not notify the purchaser or indicate to him that he is entering into a contract that would invalidate the ticket if the station where he purchased it was not stamped on the back thereof; and such requirement not appearing upon the face of the ticket, or brought to the purchaser's notice, or assented to by him, is unreasonable, and will not bind him.

5. Same—Principal and Agent—Negligence—Respondeat Superior.

Where the ticket agent of a railroad company has failed to stamp his station on the back of a ticket furnished by him to a passenger at the regular price therefor, and the conductor wrongfully ejects the passenger from the train under a rule of the company requiring it, under the circumstances, the company is liable to the passenger for the injury thereby caused, arising from the negligence of its station agent, while the conductor may be exonerated from personal blame.

6. Carriers of Passengers—Wrongful Ejection of Passenger—Avoidance of Damages—Cash Fare—Instructions—Evidence.

The plaintiff sues for damages sustained by him for being wrongfully ejected from defendant railroad company's passenger train by the conductor, who refused to recognize the validity of a ticket good for transporting the plaintiff to his destination. The defendant contended that the plaintiff, after he had been ejected, should have avoided the damages incurred by paying in cash the railroad fare to his destination, and tendered a prayer for special instruction to that effect: *Held*, the prayer was properly refused, for it assumed that the plaintiff had the money to pay the cash fare, of which there was no evidence.

7. Carriers of Passengers—Ejection of Passenger—Right to Pay Cash Fare—Rights of Conductor—Waiver—Evidence—Instructions.

When the conductor on a railroad company's passenger train erroneously assumes that a ticket, good for a passenger's transportation, is invalid, and ejects him from the train, a prayer for instruction which assumes that the conductor would then have accepted a cash fare, and

that the plaintiff should have paid so as to have avoided the damages caused by the ejection, is properly refused; for the conductor from his point of view was under no legal obligation to accept the fare after the passenger's expulsion, the latter having at that time forfeited his right by his misconduct, and there being no evidence that the conductor would have waived his right to refuse had the cash fare been tendered him.

APPEAL by defendant from *Cline, J.*, at September Term, 1912, (331) of PITT.

This action is to recover damages for the wrongful expulsion of the plaintiff from the defendant's train.

The plaintiff testified in his own behalf as follows: "On Monday morning, the 19th of June, I went to Tarboro. There I went to the station of the East Carolina Railway. Mr. Eason and his wife were there in the station. They bought their tickets to Macclesfield. I bought a ticket for Macclesfield. When the agent gave me the ticket he handed me a nickel. I said, 'Here, I want a ticket to Pinetops,' and I gave him back the nickel. Then he gave me my ticket and 10 cents back. I gave him 50 cents and got back 15 cents. The agent sold me the ticket. I suppose in about ten minutes the train left—maybe fifteen. When the conductor came through to take up the tickets I handed him my ticket. He looked at the ticket and said, 'This ticket is no good.' I said, (332) 'I can't account for that. I bought it this morning and paid for it.' He said, 'It is not stamped.' I said, 'That is the fault of the agent, and not mine.' He said, 'I cannot accept that ticket for a passage in its present condition.' I said, 'Well, the fault is with the agent, and not mine.' Mr. Eason spoke up and said, 'I saw the gentleman buy the ticket. I know he is entitled to a passage on that ticket, because he bought it and paid for it.' The conductor said he could not accept it, as he had been ordered by the superintendent of the company not to accept any ticket that was not stamped. I said, 'I haven't broken any rules of the company; that is a matter for you to take up with the company.' He said he couldn't accept it, and I would have to pay my cash fare. I said I bought and paid for a ticket, and I was not going to pay for another fare. He said I would have to pay for it or get off the train. I said that is up to you whether you carry me. The train ran about a mile probably, and he came back. He came in and said he must have the fare or 'you will have to get off the train.' I said all right. He stopped the train. I took my baggage and got off the train. When I got on the ground I said, 'This is all foolishness for you to put me off, and if you carry me there will be no damage, but if you do not, you and your company are going to get into trouble.' There were no passengers to get off or on. They just stopped to put me off. There was nobody living there. I didn't see any one. I looked around to see if I

could get a team. I met a section man. He was working the road between Henrietta and Davistown, and I asked him he knew where I could get a team. He said no, and I walked to Davistown (a nigger town) and couldn't get a team there, so I had to walk to Pinetops. I got there about 20 or 25 minutes past 2; that was about 7 miles. I was confined to my bed in the house for three weeks before that, and in the house about four weeks. I had started out that Monday morning. I had not been out before. I had been suffering from rheumatism for about seven or eight weeks, and this day I had to walk this distance was as hot a day as any day in summer. I was humiliated before the other (333) passengers by being put off the train. I was worried and vexed, and when I arrived at Pinetops I was wet with perspiration—as wet as water could make a man. I did not have a dry cloth on me. I was not able to do any work that day. I didn't even scratch my order book. I didn't take any order that day. I was not in a condition to take an order. I came home that night and did not go out again for two days. I couldn't go out, I was so sore, and I practically lost a week's business. I had mapped out Pinetops and Macclesfield and was to take the next train back to Rocky Mount that night; but instead of going there, I had to take the train to Farmville that night and get a late train home."

There was other evidence corroborating the plaintiff.

The ticket was paid for at the regular fare and contained the following printed matter on the face of it:

EAST CAROLINA RAILWAY.

Station stamped on back, to station opposite point in margin below.

Good for one passage, if used on or before midnight of date canceled by "L" punch in margin, only on trains stopping at destination. Void if it shows any alterations, erasures, or is mutilated in any manner, or if B. C. punch is in any other than place designated. If more than one date, destination, or class is canceled, it will only be accepted within the shortest limit, to the shortest destination, for the lowest class canceled. If "Clergy," it will be good only when accompanied by clergy permit. Baggage liability limited to wearing apparel not exceeding $100 in value.

HAYWOOD FOXHALL,
General Passenger Agent.

It showed plainly the point of destination, and the only defect claimed was that the agent failed to stamp on the back of it the station at which it was issued.

The defendant introduced no evidence.

The defendant moved for judgment of nonsuit, which was refused, and the defendant excepted.

The defendant tendered an issue on contributory negligence, which was refused, and the defendant excepted.

The defendant requested that the following instruction be given to the jury: "If you find the fact to be that at the time the plaintiff was in bad physical condition, and that by reason of that con- (334) dition the walk to Pinetops caused him bodily suffering, he could not be entitled to recover any damage for this, because the law does not permit a person, when he has been wronged by another, to do an act that would aggravate and add to that wrong. The plaintiff knowing his bad physical condition, should not have subjected himself to the ordeal of a walk to Pinetops. He should, after being put off the train, have tendered the fare of 35 cents demanded by the conductor and avoided and saved himself the suffering that he knew would be caused by the walk to Pinetops; so you are instructed not to allow any damage at all for any suffering caused the plaintiff by the walk to Pinetops."

The court refused to so instruct, and the defendant excepted.

His Honor did instruct the jury on this question as follows:

"If he was put off the train, then they (the company) might have been at fault in putting him off the train; but the plaintiff would have the burden of exercising due care to save himself from physical exhaustion and suffering or injury in walking the distance he said he had to walk in order to get to his destination; whether he did not do all that he could in trying to get a conveyance to his destination is a question for you; he says he did try, but could find no means of conveyance, and therefore had to walk the entire distance of 6 or 7 miles. If you find he used due diligence in endeavoring to get a conveyance or other means to reach his destination, then he could recover of the defendant for whatver physical discomfort or suffering he sustained. If you find he failed to do so, then he cannot recover for any physical suffering."

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

F. G. James & Son for plaintiff.

J. L. Bridgers for defendant.

ALLEN, J. The plaintiff paid the usual and customary fare (335) for his ticket, and was granted no right or privilege in consideration of a reduced rate.

Under these circumstances, the ticket was in the nature of a receipt for the passage money, and its office was to furnish evidence to the agents of the company that the bearer was entitled to be carried.

It was *prima facie* evidence that the holder had paid the regular price for it, and had the right to be transported, and was evidence of an

agreement on the part of the defendant to carry him to his destination for a consideration paid. 1 Fet. Cor., sec. 175; *Boyd v. Spencer,* 143 Ga., 146.

The plaintiff performed his part of the contract and was entitled to a valid ticket, and in the absence of evidence of assent on his part prior to or at the time of the purchase, was not bound by a stipulation rendering the ticket invalid, as there was no consideration to support the stipulation.

The Supreme Court of Tennessee, speaking of this question in *R. R. v. Turner,* 100 Tenn., 223, says: "We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases the ticket. It cannot be presumed that every person buying a railroad ticket, for ordinary and general use, will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place in the crowd at the ticket window, produces and hands over his money with a request for a ticket to destination. His money is received. The ticket is produced, and, after being stamped, is handed to him through the ticket window. He has had no opportunity to see what is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back, and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinarily local tickets do not generally contain any
(336) terms of contract, and are not intended to do so. They are mere tokens to the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. . . . This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains with limitations and conditions, such as excursions, round-trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look

for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket."

We quote at length from the opinion because the rule with its limitation is stated clearly and accurately.

Nor was there anything on the ticket to notify the plaintiff or to indicate to him that he was entering into a contract by which the ticket delivered to him would be invalid if the station at which it was issued was not stamped on the back, and while common carriers may make reasonable rules and regulations, they cannot bind persons dealing with them by special contracts of which they have no notice, and not contained in the writing.

In construing contracts of this kind, "language of uncertain or doubtful meaning should generally be taken in its strongest sense against the company by which the ticket was issued and sold, in favor of the purchaser. This rule of construction is in accord with common sense. It may be supposed that one who himself writes or pre- (337) pares a written contract in which he is interested will be sure to use language which he conceives is best adapted to secure to himself the full benefit of everything he could claim under the agreement the writing is intended to evidence. It is therefore allowable and just, at the instance of the opposite party, to scan critically the phraseology employed. This is obviously right for the additional reason that as the purchaser had nothing whatever to do with preparing the ticket, and had no voice in the wording of it, it was his right to claim under it the benefit of the strongest interpretation which could be made in his favor." 1 Fet. Cor., sec. 276.

The ticket does not say it will be void if the station is not stamped on the back, nor is there anything to suggest that there was any obligation on the plaintiff except to present it; and as it was evidence that the regular fare had been paid, and required no identification of the purchaser, we fail to see how the defendant could have suffered loss by accepting it. Indeed, so far as we are advised, from the evidence, the only useful purpose that could be served by stamping on the back is to enable the defendant to check up its agents.

If, however, the statement on the ticket is contractual and is equivalent to a stipulation that the ticket will be invalid unless the station at which it was issued is stamped on the back, there is no evidence that the plaintiff had notice of such requirement, and as he paid for a valid ticket, he had the right to assume that the agent had given him what he had paid for. 3 Wood Railways, sec. 349; *R. R. v. Turner*, 100 Tenn.,

223; *Head v. R. R.*, 79 Ga., 358; *R. R. v. Dougherty*, 86 Ga., 744; *Ellsworth v. R. R.*, 95 Iowa, 107.

The authorities cited fully support the text in section 349, 1 Wood on Railways, from which we quote: "When the passenger asks and pays for a certain ticket, and the station agent by mistake gives him a different one, which does not entitle him to the passage desired, the conductor has no right to expel him, and the company is liable in damages if he is expelled. The passenger has a right to rely on the agent to give him the right ticket. There are authorities which hold the other (338) way, but it seems that their views are indefensible. It is true, the conductor may have no possible means of knowing the facts of the case except through the passenger's statement, which is liable to be prejudiced or untruthful, but there is no reason why the company may not be made to respond in damages on the ground that the expulsion was the proximate consequence of the wrongful act of its agent who sold the ticket."

There is some conflict of opinion as to the liability of a carrier for ejecting a passenger on account of the mistake of the ticket agent, when the conductor is obeying a rule of the company, as shown by the full and comprehensive note to *Shelton v. R. R.*, 9 A. & E. Ann. Cases, 889, some of the courts holding that the face of the ticket presented by the passenger is conclusive, and that if the ticket does not entitle the passenger to be on the train he must pay his fare or submit to ejection, but we think the weight of authority and the better opinion is that, although the conductor has followed the regulations of the company and may be exonerated from blame personally, if the company, through its ticket agent, has done that which has caused the injury, the company is liable. 3 Wood on Railways, sec. 349; *R. R. v. Dougherty*, 86 Ga., 744; *Ellsworth v. R. R.*, 95 Iowa, 107; *Yorton v. R. R.*, 62 Wis., 370; *Trice v. R. R.*, 40 W. Va., 273; *R. R. v. Grimes*, 99 Ky., 411; *Heard v. R. R.*, 79 Ga., 358.

In the *Dougherty case* the facts were in all material respects like those in the case before us. The plaintiff demanded and paid for a ticket to Atlanta, and the agent gave her a ticket to Asheville, and she was ejected. The Court says: "We think, under these circumstances, she had a right to recover damages from the railroad company. We think she had a right to rely upon the ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same, such conduct upon the part of the railway company and its agents authorized her to recover damages," and further in the same case, quot-

ing from *Hufford v. R. R.*, 64 Mich., 631: "Where a passenger who has purchased a ticket of the authorized agent of a railroad (339) company, believing in good faith that it is genuine, and issued by the company, and such as the agent had a right to sell, states such facts to the conductor of the train, such conductor is bound to take such facts as true until the contrary is proven, without regard to any words, figures, or other marks on the ticket."

The language first quoted from the Georgia case is expressly approved in the Iowa case, and the other cases cited sustain fully the same doctrine. The principle upon which *Mace v. R. R.*, 151 N. C., 404; *Harvey v. R. R.*, 153 N. C., 567, and *Dorsett v. R. R.*, 156 N. C., 439, were decided is the same, as in each the railroad was held liable in damages for expelling a passenger, brought about by the mistake of the agent, although the conductor was obeying a rule of the company.

If we apply these principles to the evidence, it follows necessarily that there was no error in refusing to enter judgment of nonsuit, and that there was no evidence of contributory negligence, as it appears that the plaintiff demanded and paid for a ticket at the regular fare; that he had no notice of any stipulation that might invalidate it, and that he was ejected from the defendant's train because of the mistake of its agent.

We might dispose of the defendant's special prayer for instruction upon the technical ground that it assumes that the plaintiff had 35 cents, when there is no evidence that he had more than 15 cents, but we prefer to consider the more important question presented.

The contention of the defendant is that if it be admitted that the plaintiff was wrongfully ejected from the train, the tort was complete when the plaintiff reached the ground, and that it was then only a question of damages, which it was the duty of plaintiff to decrease. The defendant has furnished us with no authority in support of this view, but while not directly in point, the trend of the decisions in *R. R. v. Arnold*, 8 Ind. App., 300; *Yorton v. R. R.*, 62 Wis., 370, and *Harvey v. R. R., supra*, is against it.

In the *Arnold case* the Court says: "We do not concur in the doctrine that it was the duty of the appellee to pay the extra fare (340) demanded of him and afterwards settle the question in dispute with the company or its agents. It is true that the amount demanded was trifling, but the principle involved is the same as if the sum demanded had been a large one. . . . Appellant chose to stand upon what it conceived to be its strict legal rights. It cannot now be heard to complain if the appellee chose to do the same. It comes with an ill grace for the appellant, after it has pushed what it believed to

be its rights to the last extremity, to say that because it offered to carry appellee if he would pay his fare, the damages ought to be mitigated. Appellee was under no legal obligation to accept any offer, no matter how considerately made. In fact, the offer itself was only what the appellant would have been compelled to give to any person who would pay the fare demanded. The time to be magnanimous was before the expulsion occurred. Appellant cannot excuse or palliate the wrong or mitigate the damages flowing therefrom by its subsequent acts."

If, however, the position is sound, the instruction was properly refused, because it is assumed that the conductor would have accepted a tender of fare after the expulsion, and there is no evidence of this fact. The conductor was acting upon the assumption that the ticket was invalid, and that he had the right to eject the plaintiff. If so, it was his duty to accept the fare before expulsion, but was under no legal obligation to do so afterwards. *Clark v. R. R.*, 91 N. C., 512; *Pickens v. R. R.*, 104 N. C., 325.

The Court says in the *Clark case:* "Nor when the officer has stopped the train and he is descending the steps and is about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct, by breaking his own contract to pay, when called on, and it is not regained by his repentance at the last moment and after he has caused the inconvenience and delay to the company by his wrongful act"; and in the *Pickens case:* "If the tender of fare is made by a passenger or any other person for him before the train is stopped to expel him, the company must accept it and allow him to remain; but after the train has been stopped for that pur-
(341) pose, he cannot reimpose upon the company the obligation to perform a contract which he had violated in the first instance, by an offer of the money that he ought to have paid when demanded."

Upon the facts as they appeared to the conductor, he had the right to eject the plaintiff, and the plaintiff had lost his right to tender fare, and there is no suggestion that the conductor then offered to allow him to pay fare and return to the train after he was ejected, nor was there any reason for the plaintiff to believe that the conductor, who had so recently exacted a compliance with the letter of the law, as against him, would waive his legal rights as he conceived them, in his behalf.

There are other exceptions in the record, which we have examined, and which it is not necessary to discuss. We find

No error.

Cited: Hallman v. R. R., 169 N. C., 131.

BANK OF GREENVILLE v. GEORGE GORNTO.

(Filed 26 February, 1913.)

1. Estates—Entireties—Husband and Wife—Privy Examination.

A lease of lands for ten years by a husband and wife, which is held by them in entireties, without the privy examination of the wife, is void as to the latter.

2. Estates—Entireties—Common Law—Lessor and Lessee.

Estates held by husband and wife by entireties possess the same properties and incidents as at common law, and while neither may convey them so as to defeat the right of the survivor to the whole, the husband alone may lease them during their joint lives, or until the death of his wife.

3. Same—Constitutional Law.

The properties and incidents to estates held in entirety by husband and wife are not changed or affected by Article X, sec. 6, of our State Constitution as to the rights of married women.

4. Lessor and Lessee—Leases—Renewals—Covenants—Deeds and Conveyances—Registration—Notice.

The renewal clause of a lease of lands for two years, "with the privilege of ten years thereafter on the same terms," is sufficient in form and a valid part of the lease, and a covenant running with the land, and when duly recorded is binding upon the grantee, who takes with notice.

5. Lessor and Lessee—Leases—Renewals—Covenants—Effect.

Covenants in a lease of lands with privilege to the lessee to renew are binding upon the legal successors of the lessee as well as those of the lessor.

APPEAL from *Cline, J.*, at December Term, 1912, of PITT. (342)

The action is brought to recover possession of a lot and building conveyed by J. A. Brady and wife, Georgia, to plaintiff on 29 April, 1912, by deed recorded 6 May, 1912. The lot was leased 8 January, 1910, by Brady and wife to Gornto for two years, commencing 1 February, 1910, "with the privilege of ten years thereafter, on the same terms," etc., recorded 2 April, 1912. The privy examination of Mrs. Brady was never taken to the lease. All the conditions of the lease have been complied with by the lessee and he has given due notice in apt time that he will continue the lease for ten years.

It is admitted that the property was conveyed by a deed to Brady and his wife and that they hold an estate by entireties.

His Honor rendered judgment for defendant, and the plaintiff appealed.

Jarvis & Blow and Harding & Pierce for plaintiff.

Harry Skinner and Albion Dunn for defendant.

BROWN, J. The principal question presented by this appeal is the validity of the lease for ten years made by Brady to defendant without the privy examination of Brady's wife. As to her, of course, the lease is void.

As Brady and his wife held, not as tenants in common or joint tenants, but by entireties, their rights must be determined by the rules of the common law, according to which the possession of the property during their joint lives rests in the husband, as it does when the wife is sole seized. Neither can convey during their joint lives so as to bind the other, or defeat the right of the survivor to the whole estate.

Subject to the limitation above named, the husband has the same rights in it which are incident to his own property.

(343) By the overwhelming weight of authority the husband has the right to lease the property so conveyed to him and his wife, which lease will be good against the wife during coverture and will fail only in the event of her surviving him. *Pray v. Stebbin,* 141 Mass., 219; 15 A. & E. Enc., 849; *Washburn v. Burns,* 5 Vroom, 18; *Barber v. Harris,* 15 Wend., 615; *Jackson v. McConnell,* 19 Wend., 175; *Fairchild v. Chastelleux,* 44 Am. Dec., 117; *Pollock v. Kelly,* 6 Ir. C. L., 367-375; *Godfrey v. Bryan,* 14 Ch. Div., 516.

In this State our decisions have long since been settled in accordance with the common law. *Topping v. Saddler,* 50 N. C., 359; *Simonton v. Cornelius,* 98 N. C., 437; *Bruce v. Nicholson,* 109 N. C., 204; *West v. R. R.,* 140 N. C., 621; *Bynum v. Wicker,* 141 N. C., 96.

In this last named case it is said: "This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many States. This not having been done, it still possesses here the same properties and incidents as at common law."

The properties and incidents of this estate are not changed or affected by Article X, sec. 6, of our State Constitution as to rights of married women. *Long v. Barnes,* 87 N. C., 333.

It is contended that the ten-year extension clause is void and cannot be enforced against the plaintiff. The lease being valid during the lessor's life, the plaintiff occupies no better position than he. It was duly recorded prior to the conveyance to plaintiff, thereby giving full notice, by which plaintiff is bound. It is admitted that defendant gave due notice of his intention to exercise the privilege of renewal for ten years and also continued in possession, and it appears that the lessor Brady acknowledged defendant's right to do so.

We think the renewal clause sufficient in form and a valid part of the lease. *Barbee v. Greenberg,* 144 N. C., 432. In this case the lease was for three years, "with the privilege of three years more."

Covenants to renew are not personal. They run with the land, and are binding upon the legal successors of the lessee as well as the lessor. They are entitled to the benefits and are burdened with the obligations which such covenants confer on the original parties. (344) 24 Cyc., 996. The judgment is

Affirmed.

NATHAN L. CULLENS ET AL. v. WILLIAM E. CULLENS AND J. W. PERRY.

(Filed 19 February, 1913.)

1. Deeds and Conveyances—Grantee's Children—Tenants in Common.

Under a deed to lands made to a woman and her children, the grantee named, and her children living at the date of the deed, including one in *ventre sa mère*, take as tenants in common.

2. Deeds and Conveyances—Prior to 1879—Heirs—Estates for Life.

In the premises of a conveyance of lands made prior to 1879, the language of the deed was "unto C. and her children"; in the habendum, "unto her, the said C., and her children forever." The word "heirs" did not appear in the deed in connection with the grantees, though the warranty was that of the grantor, "his heirs and assigns": *Held*, at the time of making the deed it was necessary to pass the fee that the word "heirs" be used in connection with the title passed to the grantee, and that the grantees in the deed in question took only a life estate.

3. Same—Equity—Mistake—Pleadings—Proof.

Where a deed to lands made prior to 1879 passed only a life estate, by reason of the word "heirs" not having been used in connection with the grantees' title, and no equitable relief is alleged or proved on the ground of mistake, none may be granted.

APPEAL from *Webb, J.*, at October Term, 1912, of HERTFORD.

Petition for partition of land, commenced before the clerk of the Superior Court of Hertford and tried upon issues joined before *Webb, J.*, at October Term, 1912.

The plaintiffs allege that Sarah A. Cullens died seized in fee of said lands, and at her death they descended to her children, the plaintiffs and defendant William E. Cullens. The defendant William E. Cullens answers that he denies section 2 and alleges that Sarah A. Cullens died seized in fee of only an undivided one-fourth (1/4) interest in the land therein described, and that he (defendant) was a tenant (345) owning an undivided one-fourth (1/4) interest in fee in said land. He further says that upon the death of Sarah A. Cullens one-eighth of

her one-fourth (¼) interest descended to him, and that he is now the owner in fee of .... part in the land aforesaid. The defendant Perry makes the same answer as his codefendant and claims to be the owner of his interest in the lands, which have been sold by agreement pending this proceeding, and the litigation is over the proceeds.

His Honor gave judgment that plaintiffs are tenants in common in fee with defendant William E. Cullens, each of an undivided one-eighth interest, as heirs at law of Sarah A. Cullens.

The defendants Cullens and J. W. Perry appealed.

Pruden & Pruden and S. Brown Shepherd for plaintiffs.
Winborne & Winborne and Murray Allen for defendants.

BROWN, J. The only question presented on this appeal is, What interest has the defendant William E. Cullens in the land sold for partition?

It is admitted that William Lassiter owned the land in controversy and on 16 August, 1865, conveyed the same by deed to his daughter Sarah A. Cullens and her children, reserving a life estate to himself and his wife, Parthenia.

The language of the deed in the premises is "unto Sarah A. Cullens and her children," and in the habendum, "unto her the said Sarah A. Cullens and her children forever."

There is a clause of warranty in these words: "and I, the said William Lassiter, for myself, my heirs and assigns, do and will warrant and defend the right and title of the above described tract of lands unto the said Sarah A. Cullens and her children forever against the lawful claim or claims of all persons whomsoever."

The plaintiffs contend that the deed to Sarah A. Cullens and her children conveyed only a life estate, on account of the absence of the word "heirs" in connection with the name of the grantee, and that all her children took equally an undivided one-eighth interest. The defendants claim that, under said deed, Sarah A. Cullens and her three
(346) children living at the date of the deed became owners of the land in fee simple, subject to the life estate of the Lassiters.

At the date of the deed Sarah had three children, the defendant W. E. Cullens being one of the three. One of the three children died young prior to the death of Parthenia, who survived her husband. After the death of Parthenia, Sarah had born unto her several other children, all of whom survived their mother, who died in 1911.

We think it well settled that where land is conveyed, as in this case, to a woman and her children, they take as tenants in common, and only those born at the date of the deed take, unless there is one *in*

ventre sa mère, and then such child would also take; but that fact did not exist in this case. *Dupree v. Dupree,* 45 N. C., 164; *Gay v. Baker,* 58 N. C., 344; *Heath v. Heath,* 114 N. C., 547; *Campbell v. Everhart,* 139 N. C., 511.

The next question is, What estate did Sarah and her children (living at date of the deed) take under it? The plaintiffs contend that only a life estate passed under the deed, while the defendants contend a fee simple passed.

As the word "heirs" nowhere appears in the deed in connection with the grantees, Sarah Cullens and her children, we are of opinion that the said grantees each took only an estate for his or her life. In the recent case of *Boggan v. Somers,* 152 N. C., 390, it is held that deeds to land made prior to 1879 will not be construed as in fee in the absence of the word "heirs" in the conveyance, connected with the name of the grantee, and descriptive in some way of the estate he is to take; and a fee will not pass when it appears only in connection with the name of the grantor. In a well considered opinion reviewing the precedents, *Mr. Justice Hoke* says: "While our Court has long shown a disposition to interpret deeds as conveying a fee simple where such a construction would manifestly best effectuate the intent of the parties, in deeds bearing date prior to the statute of 1879 they have always required, for the creation of such an estate, that, as a mere construction of the legal title on the face of the instrument, the word "heirs" should appear in the deed as connected with the name of the grantee, and descriptive in some way of his estate, and that such a construction (347) was not permissible when it only appears in connection with the name of the grantor." See, also, *Real Estate Co. v. Bland,* 152 N. C., 225, and *Anderson v. Logan,* 105 N. C., 266.

In this last case it is expressly held that "where there are no words of inheritance in the instrument, or where the word 'heirs' does not appear in any part of the deed except in connection with the name of the bargainor, or with some expression, such as 'party of the first part,' used in the clause of warranty, or elsewhere, to designate the grantor, the deed, if executed before the act of 1879 was passed, will be construed as vesting only a life estate in the bargainee. *Stell v. Barham,* 87 N. C., 62."

We are advertent to a line of cases which hold that where the word "heirs" does not appear anywhere in the deed, upon an allegation in the pleadings of mistake, etc., a court of equity will construe the deed as passing a fee simple, when upon the instrument itself such intention plainly appears. *Vickers v. Leigh,* 104 N. C., 248; *Real Estate Co. v. Bland, supra.* The pleadings in this case fail to present such question.

The answers of the defendants contain no allegation that the word "heirs" was omitted by mistake and that it was the plain intention of the grantor, William Lassiter, to convey the land to his daughter Sarah and her then living children in fee. The defendant asks for no equitable relief. But we are not prepared to say that upon the face of this deed it was the manifest intention of William Lassiter to give the land to Sarah Cullens and her then living children in fee to the exclusion of those after-born. It was more likely his intention to convey it to Sarah herself in fee and after her death to her children, using the word "children" in the sense of heirs of her body. But under the settled decisions of this Court the instrument fails to effectuate such purpose, and in our opinion conveys to Sarah and her children living at date of the deed an estate for life as tenants in common. It therefore follows that the defendant William E. Cullens is the owner for his life of one-fourth interest in the land, and is entitled to the same life interest in one-fourth of the proceeds of sale.

It may be that when William Lassiter died the fee descended to Sarah, his daughter, if she was his only heir, and if so, the defendant
(348) William E. Cullens would inherit along with the other heirs at law of Sarah. That will be inquired into on next trial.

The effect of the special proceeding for partition in 1865 between the heirs at law of William Lassiter was not passed on by the judge below and is not presented on this appeal by any assignment of error, and the same is true as to evidence which the court declined to hear, that Sarah Cullens had been in the adverse possession of the land from 1867 to her death in 1911. As Sarah was a life tenant, and as such in possession, we fail to see how she acquired title to the fee by adverse possession; but that matter may also be gone into on the next trial.

New trial.

Cited: Cedar Works v. Lumber Co., 168 N. C., 394.

FLOYD FERRELL v. C. L. HINTON ET AL.

(Filed 19 February, 1913.)

1. Pleadings—Issues—Waiver.

When a party to an action involving the title to lands in dispute contends that a certain mortgage, necessary in the paper title of the adverse party, is barred by the statute of limitations, Revisal, sec. 391, subdivision 3, relating to mortgagor's ten-year possession, an objection that the same was not specially pleaded is waived when, after the con

clusion of the evidence and argument, he obtains permission from the court to open the case and offer evidence tending to show that the mortgage had been kept in date by payment, thus rendering the issue appropriate and necessary.

2. Appeal and Error—Objections and Exceptions—Assignments of Error—Practice.

An objection to an issue submitted to the jury must be made at the time, in order to base an assignment of error thereon, or it will not be considered on appeal.

CLARK, C. J., and HOKE, J., concurring.

APPEAL from *Lane, J.*, at September Term, 1912, of CAMDEN.

Action for possession of lands. These issues were submitted:

1. Did W. C. Ferrell make payment on the mortgage debt in question, as claimed by defendants? Answer: No.
2. Are plaintiffs the owners and entitled to the possession of (349) the lands in question? Answer: Yes.
3. What is the annual rental? Answer: $20.

From the judgment rendered, defendants appealed.

E. F. Aydlett for plaintiff.

Ward & Thompson for defendant.

BROWN, J. This is an action to try the title to land. Plaintiffs and defendants claim under a common source. Defendants claim under a mortgage executed by W. C. Ferrell and wife 6 January, 1896, and due 1 January, 1897, to C. G. Etheridge. This mortgage was foreclosed under power of sale 6 June, 1910, and deed executed to defendants.

Plaintiffs content that the mortgage and debt secured in it were barred by the statute of limitations, Revisal, sec. 391, subdiv. 3, and that the power of sale was inoperative and the sale and deed made in pursuance of it void.

The defendants contend that there is no such plea set up in the complaint, and that therefore his Honor erred in submitting the first issue.

It is unnecessary to pass upon this point, as we do not think it is open now to defendants to raise it. The record discloses that after the conclusion of the evidence and after argument to the court, the defendants' counsel asked the court to open the case and permit them "to offer evidence tending to show that the mortgage had been kept in date by payments within ten years from the foreclosure." The court permitted this to be done at the instance of defendants, and evidence was offered by both parties. This request of defendants, in our opinion, rendered the submission of the first issue appropriate and necessary.

The evidence having been introduced upon request of defendants, it is not open to them to object to the submission of an issue made necessary by their conduct.

Again, the record does not show that defendants entered an exception to the submission of this issue, although it constitutes an assignment of error. The record shows that after the evidence was finally closed,
(350) counsel argued that the first issue was not material and not raised by the pleadings and should not be submitted, but the record fails to show that an exception to the submission of the issue was taken and entered at the time.

The judgment of the Superior Court is

Affirmed.

CLARK, C. J., concurs in the opinion of the Court for the reason given, and for further reason:

The complaint alleges that the plaintiff is the owner and entitled to the possession of the land in question, without setting out his chain of title. The defendant answered, denying the allegations of the complaint and without setting out any chain of title. It was therefore open to the defendant to attack the validity of any deed offered by the plaintiff without having pleaded its invalidity. For a stronger reason it was open to the plaintiff to attack the validity of any deed offered by the defendant, without having pleaded its invalidity. Indeed, he could not foresee what deeds the defendant would offer.

When the defendant offered the deed from the trustee in a power of sale, under a mortgage which fell due 1 January, 1897, and it appeared that the mortgage had been foreclosed under said power of sale 6 June, 1910, the plaintiff was entitled to rely upon that evidence to assert the invalidity of the deed executed by the trustee. *Menzel v. Hinton,* 132 N. C., 660, was corrected by Revisal, 1044, which makes such power of sale *inoperative* after the lapse of ten years.

If there had been payments which would have taken such deed out of the statute, the burden was upon the defendant to show such fact. The plaintiff could not have pleaded the statute of limitations to a mortgage and power of sale which were not set out in the answer. Besides, a reply is not required except when the answer sets up a counterclaim. When the answer contains matter of defense merely, or by way of avoidance, the plaintiff is not required to reply unless so ordered by the court. Revisal, 485.

HOKE, J., concurs in concurring opinion.

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R. H. HARDY AND N. D. MEWBORN v. N. W. MITCHELL.

(Filed 26 February, 1913.)

1. Negotiable Instruments—Indorsers—Due Course—Instructions.

Where the defense to an action on a negotiable note involved the question as to whether it was indorsed to the plaintiff in due course, it is error for the trial judge to omit from his charge as to what constituted due course, that the indorsee received it in good faith, for value, and that "at the time it was negotiated he had no notice of any infirmity in the instrument or any defect in the title of the person negotiating it"; but in this case the error was rendered harmless when construed with the other parts of the charge, wherein the burden was placed on the plaintiff to show that he had no knowledge of the infirmity of the note or of any defect in the title of the person negotiating it.

2. Instructions—Statements of Fact—Objections and Exceptions—Appeal and Error.

In an action upon a note, a charge to the jury that the amount paid for the note was not controverted, was merely a statement as to a fact, and not a conclusion of law, and if an erroneous statement, it was the duty of objecting counsel to have called it to the attention of the judge in time for him to correct it and clear up the misunderstanding, and comes too late when excepted to after the trial.

3. Same—Presumptions.

Where it appears that the judge made a certain statement as to an admission of the parties in his charge to the jury, it will be assumed on appeal to be a correct statement, nothing else appearing; and the record is silent thereon.

APPEAL from *Cline, J.*, at September Term, 1912, of GREENE.

Civil action brought to recover upon a note.

These issues were submitted to the jury:

First. Was the note given for a valuable consideration? Answer: No.

Second. Was the note sued on procured by fraud and under circumstances against public policy, as set out in the answer? Answer: Yes.

Third. Was the note sued on indorsed to plaintiffs in due course and before maturity? Answer: Yes.

From the judgment rendered, the defendant appealed.

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L. V. Morrill and L. I. Moore for plaintiffs.

J. P. Frizzelle, G. V. Cowper and L. R. Varser for defendants.

BROWN, J. This case was before this Court at a former term and is reported in 156 N. C., 76, which is referred to for a statement of the facts.

His Honor instructed the jury upon the third issue as follows:

"Was the note sued on indorsed to the plaintiffs in due course and before maturity? The burden of that issue is upon the plaintiffs to satisfy you by the weight of the evidence that they received the note in due course.

"In the case of a negotiable instrument, the law applies to it when you say 'due course' the following: That the holder in due course is the holder who has accepted the instrument under the following conditions: That the instrument is complete and regular upon its face, and that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such is the fact."

The defendant excepted to so much of said charge as defines the meaning of "due course" as used in our statute, Revisal, chap. 54, sec. 2201, commonly known as the negotiable instrument statute.

We think the exception is not well taken. It is true that his Honor omitted two essential parts of the definition as laid down in this case, 156 N. C., 76, and *Bank v. Fountain,* 148 N. C., 590, viz., "in good faith and for value," "and at the time it was negotiated to him he had no notice of any infirmity in the instrument or any defect in the title of the person who negotiated it."

We think the omission was fully supplied in subsequent parts of the charge wherein the jury were instructed that the burden was on the plaintiff to show that he had no knowledge of the infirmity in the note and no notice of any defect in the title of the person negotiating it.

Defendant excepts because his Honor instructed the jury that "there is no controversy upon the question that Mewborn paid $225 for
(353) the note of $250 and that it is admitted that $225 was paid for the note."

It is true, we find no such admission in the record, but it may have been made orally during the trial and not appear of record, but the instruction was a statement of a fact made to the jury by the court. It was not a conclusion of law. If it was an inadvertence upon the part of the judge, it was the duty of counsel for defendant at the conclusion of the charge, or at some appropriate moment before the case was finally given to the jury, to call the judge's attention to it, so that the misunderstanding could be cleared up and the error corrected at the time. Counsel will not be permitted to sit still and acquiesce in a statement by the court that a fact is admitted when it is not. Counsel should give the court opportunity to correct the error, if in fact one was made.

It is different in regard to matters of law embodied in the charge. To those instructions counsel may note exception after the trial is over, and are not required to except or call the court's attention to them immediately at conclusion of the charge. "We must assume," says *Mr. Justice*

Allen, "that the judge correctly stated the admissions of the parties, and if by inadvertence he did not, it ought to have been called to his attention at the time, and cannot be made the subject of exception for the first time in the case on appeal." *LaRoque v. Kennedy,* 156 N. C., 360.

We think it needless to consider the other exceptions. We have examined them and found them to be without merit.

Affirmed.

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BEN JONES v. J. J. FOWLER AND CITY OF WILMINGTON.

(Filed 12 March, 1913.)

1. Courts—Justices of the Peace—Docketing Appeal—Action Dismissed—Waiver.

When an appeal from a judgment of a justice of the peace is not docketed in the Superior Court in the time prescribed by the statute, it will be dismissed unless the provision is waived by the adverse party, and an agreement which only provides for the custody of the property pending the appeal does not have the effect of a waiver of the time within which the appeal should be docketed.

2. Courts—Justices of the Peace—Presumptions—Jurisdiction—Motions to Dismiss—Judicial Knowledge.

Where a judgment has been obtained in the court of a justice of the peace to recover 300 pints and half-pints of whiskey, the value stated in the summons to be less than $50, the presumption is that the judgment is valid and that the facts necessary to sustain it exist; and the Supreme Court will not assume that its value is greater than that found, upon a motion to dismiss for want of original jurisdiction in the justice's court.

APPEAL by defendants from *Carter, J.,* at January Term, 1913, of PENDER.

This is an action to recover 300 pints and half-pints of whiskey.

The action was commenced before a justice of the peace on 20 February, 1912, and the value of the property is stated in the summons to be less than $50.

Judgment was rendered in favor of the plaintiff by the justice of the peace on 21 February, 1912, and it was then agreed that the defendants should hold the whiskey and bottles until the cause should be finally decided by the higher court.

The defendants appealed, but the appeal was not docketed in the Superior Court until 10 September, 1912, four terms of the Superior Court having intervened between the time the appeal was taken and the docketing of the same.

At Fall Term, 1912, the appeal was dismissed because of delay in docketing, and the defendants excepted and appealed.

The defendants move in this Court to dismiss the action, upon the ground that the Court can take judicial notice that the quantity of (355) whiskey sued for is worth more than $50.

No counsel for plaintiff.
H. M. McClammy for defendant.

ALLEN, J. The appeal was not docketed in the time required by law, and was properly dismissed (*Davenport v. Grissom,* 113 N. C., 38; *Peltz v. Bailey,* 157 N. C., 167), unless the agreement entered into between the parties is a waiver of the right to dismiss, and we think it cannot have this effect.

It does not purport to deal with the right of appeal or the time of docketing, and simply provides for the custody of the property pending the appeal.

The motion to dismiss the action upon the ground that the value of the property is more than $50 cannot be allowed.

The value is stated in the summons to be less than $50, and it does not seem that this was controverted before the justice, and the justice has rendered judgment in favor of the plaintiff.

The presumption is that the judgment is valid, and the facts necessary to sustain it are presumed to exist.

Again, the whiskey has no market value in Wilmington, because it cannot be legally sold there, and in the absence of a market value, and in the face of the statement in the summons and the judgment of the justice, this Court must decline to hold that its intrinsic value is generally known, or that the Court has any special expert knowledge upon the subject.

Affirmed.

Cited: Helsabeck v. Grubbs, 171 N. C., 338.

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S. G. HIGHSMITH ET ALS. v. M. R. PAGE ET ALS.

(Filed 5 March, 1913.)

Deeds and Conveyances — Equity — Reformation — Husband and Wife — Evidence—Communications, Etc.—Interpretation of Statutes.

Where a deed made to husband and wife, upon its face, conveys lands to them as tenants in common, and it is sought to be reformed, for mutual mistake, so as to convey an estate in entirety, the wife being then

dead, it is competent for a party in interest to testify to declarations of the deceased wife, made in the presence of the husband, who is still living and a party to the suit, against his interest, to which he made no denial. Revisal, sec. 1631.

APPEAL by defendant from *Cline, J.*, at September Term, 1912, (356) of PITT.

Julius Brown and Moore & Long for plaintiffs.
Harry Skinner for defendants.

CLARK, C. J. This cause was before us, 158 N. C., 226, where the facts are fully stated. The action was brought by the plaintiffs, who are the children and grandchildren of Elizabeth Page, now deceased, to reform a deed and to remove certain conveyances which are alleged to be clouds upon the title and to restrain the cutting and removing timber from the land. The complaint alleges that M. R. Page and his wife, Elizabeth, purchased from S. R. Ross a tract of land, Mrs. Page buying for herself and paying for that part of the land which lay on the east side of the canal and her husband that part lying west of the canal, but that by mutual mistake of the grantor and grantees and of the draftsman, the deed did not so express the intent. The defendant M. R. Page and his grantees and codefendants contended that the deed from Ross to him and his wife conveyed an estate in entirety, and that, therefore, she being dead, his conveyance of the land on the east side of the canal and of the timber thereon was valid. On the former hearing in this Court it was held that the deed on its face did not convey an estate in entirety, but that M. R. Page and his wife were tenants in common. On the second trial below the jury found that the contention of the plaintiffs was correct and that the deed should be reformed and that the land on the east side of the canal belonged to the children and grandchildren of Elizabeth Page, subject to the tenancy by the curtesy of M. R. Page.

Exceptions 1 and 2 are to the testimony of Jane E. Whichard, one of the plaintiffs, as to a conversation between her mother, Elizabeth Page, and her stepfather, M. R. Page, as to her mother's interest (357) in the land east of the canal. The defendant excepted to the admission of this testimony because the witness was a party to this action and her mother was dead. But this does not bring her evidence under the prohibition in Revisal, 1631. Her testimony is against M. R. Page, a living person, who is competent to take the stand in reply. *Bunn v. Todd*, 107 N. C., 266. The testimony was competent as a declaration made in the presence of M. R. Page which called for an answer, but which was not denied by him.

Exception 3 was abandoned. Exceptions 4, 5, 6, and 7 are to the

testimony of other witnesses as to conversations between Page and his wife to like purport, and are competent to show *quasi*-admissions by him, as to the true nature of the transaction when the Ross deed was given. Exceptions 9, 10, and 11 are to evidence of statements made by S. R. Ross, a witness for the plaintiff, contradictory to those he made on the stand. Exception 12 is for a refusal to nonsuit, and exception 14 is a broadside exception to the charge, and do not require discussion.

Exception 13 is to the refusal of issues asked and to the issues submitted, and cannot be sustained. Every phase of the controversy could be presented on the issues actually submitted. *Humphrey v. Church,* 109 N. C., 137.

No error.

CLARA BEACOM v. JAMES AMOS.

(Filed 13 March, 1913.)

1. Deeds and Conveyances—Contingent Interests—Conveyances in Fee—Title.

Where devisees of lands take subject to contingent interests, as where the fee-simple title would vest in one upon his surviving the other, and each executes to the other a conveyance of an absolute estate in fee simple forever, of the part of the lands to be held by him in the division of the whole thereof, the agreement thus to divide by the deeds necessarily divests the estate of each grantor of its contingent character, and the grantee holds it in fee absolute.

2. Same—Tenants in Common—Estate Conveyed.

Where a division of lands is effected by devisees upon which the will imposes certain contingent interests as between the parties, and from construing the interchangeable deeds it appears that their intent and purpose was to convey the fee-simple absolute to each other, the doctrine that where a voluntary partition of lands or one accompanied by deed has been made by tenants in common they hold the land thus apportioned subject to the contingencies imposed by the will, has no application.

3. Deeds and Conveyances—Possibilities—Contingent Interests—Assignments—Equitable Interests—Statute of Uses.

While mere possibilities cannot be transferred at law, executory devises and contingent remainders are not considered as bare possibilities, but as certain interests and estates, and as such may be conveyed. In this suit, the question of whether the assignment passed a legal or equitable interest is immaterial, as the defendant set out the essential facts and relied upon them as a defense.

APPEAL by plaintiff from *Daniels, J.,* at Fall Term, 1912, of (358) VANCE.

This action was brought to recover certain land and personal property by the plaintiff, Clara Beacom, against the defendant, James

Amos. The property in controversy was originally owned by Robert Beacom, who was the father of Hamilton Beacom, Clara Beacom, Mary J. Beacom, and Annie Beacom. Mary J. Beacom married James Amos and predeceased her father, leaving her surviving her husband and the following children: Maggie Amos, Mary Amos, Myrtle Amos, Annie E. Amos, and Clara B. Amos. The husband, James Amos, after the death of Robert Beacom, married his wife's sister, Annie Beacom, who died 28 April, 1905, without issue, leaving a will in which she devised and bequeathed her entire estate, real and personal, to her husband, James Amos. Robert Beacom died in 1898, leaving a will in which he devised and bequeathed all of his property to his wife for her life, and subject to her life estate; to Hamilton Beacom he devised a tract of land containing 250 acres, upon the following condition: "To have and to hold the same unto him, the said Hamilton Beacom, and his heirs and and assigns forever: *Provided, however,* if the said Hamilton Beacom shall die without issue living, then and in that event I give and devise said land above described to my daughters, Clara and Annie (359) Beacom, and their heirs and assigns: *Provided further,* that in case the said Clara and Annie shall die without issue, then I give and devise said land to the children of James Amos and my daughter Mary J. Amos (the last now dead) who may be living at the time of the death of my son and daughters as above set forth, in fee simple, to be equally divided between them." And also subject to his wife's life estate and the devise to Hamilton Beacom, he devised and bequeathed to Clara Beacom and Annie Beacom the rest and residue of his property, "to have and to hold the same unto them and their heirs, executors, administrators, and assigns absolutely and in fee simple, share and share alike: *Provided, however,* if either the said Clara or Annie Beacom should die without issue, then the survivor thereof shall take, have, and hold said property absolutely and in fee simple. Referring to the said property above bequeathed and devised to my said daughters Clara and Annie Beacom, it is my will that in the event of the marriage of either of them, then the real estate and such personal property as then may be shall at once be sold by them and the proceeds thereof equally divided between them and to be held by them as above set forth." Robert Beacom had an interest in the estate of J. E. Beacom, deceased, and also in the copartnership of Beacom Brothers, the business of which concern was continued by Hamilton Beacom, as executor of John E. Beacom, after his death, until 11 May, 1900. It further appears that Mary Beacom, widow of Robert Beacom, left a will, by which she bequeathed her interest in the copartnership of Beacom Brothers to her son, Hamilton Bea-

com. The case shows that a dispute arose between the children of Robert Beacom, who were also his devisees and legatees, as to their rights and interests in his estate, and as to the settlement of his affairs, especially the business of the firm of Beacom Brothers, and this controversy between them engendered much bitter feeling and some acrimony, when by the kind intercession and tactful efforts of their able attorney and friend, Mr. A. C. Zollicoffer, these conflicting claims and interests were harmonized and adjusted upon terms fully satisfactory to all the parties, and on that day, 11 May, 1900, in order to carry out their agreement and to finally settle all matters of disagreement between them, they executed several deeds, conveying and transferring to each other definite and
(360) absolute interests in the property described by them in the said deeds, which were of the following description and character:

First. A deed from the plaintiff, Clara Beacom, to her sister, Annie Amos, reciting the terms of Robert Beacom's will and, further, the wish of the parties to convey to each other certain parts of the property devised to them, so that they might hold the same in severalty, absolutely and in fee simple, free from any claims therein of the one party against the other, the part so definitely described and conveyed. The said Clara Beacom then by deed conveyed to Annie Amos, "in fee simple and absolutely forever," certain tracts of land therein described, and certain articles of personal property, which is the property now in dispute.

Second. On the same day and at the same time, James Amos and wife, Annie, executed their deed conveying to Clara Beacom, with the same recitals and the same estate, certain land therein described. The last two deeds described the land devised by their father to Clara and Annie Amos.

Third. On the same day and at the same time, all of the interested parties, heirs, devisees, and legatees of Robert Beacom, that is, Hamilton Beacom, Clara Beacom, James Amos and wife, Annie Amos, Sallie Beacom, parties of the first part, and James, as trustee of his children (whose names are therein set forth), party of the second part, entered into a deed of settlement as to all their interests and business affairs, the said deed having the following recital: "Whereas, heretofore, during the year 1897, John E. Beacom, late of the county of Vance, died, leaving a last will and testament in which he named Hamilton Beacom as his executor; and whereas at the time of his death his estate consisted mainly of the mercantile business in the town of Henderson, N. C., conducted under the name of Beacom Brothers, and the same has not been settled, but the business has been continued until the present time by Hamilton Beacom as executor; and whereas the parties of the first part were interested in said estate as creditors and legatees and heirs at law;

and whereas Robert Beacom and his wife, Mary Beacom, who were also interested in said estate, are dead, leaving wills in which (361) the parties of the first part are interested as legatees and devisees; and whereas it is the desire of the parties of the first part that there shall be a full, final, and complete settlement of the estate of J. E. Beacom, Robert Beacom, and Mary Beacom among and between the parties of the first part; and whereas a full, final, and complete settlement of the said estate has been agreed on by and between the parties, and as a part of the consideration of the settlement it has been agreed that the land hereinafter described shall be conveyed to James Amos, trustee for his children, Maggie Amos, Mary Amos, Myrtle Amos, Annie E. Amos, Clara B. Amos, in fee simple; and whereas it is the desire of the parties of the first part to carry out said agreement and settlement: Now, therefore, in consideration of the premises and other divers good and valuable considerations, and the sum of $10 to them in hand paid," and so forth. The parties of the first part then conveyed to James Amos, as trustee of his children (by his wife, Mary Amos, formerly Mary Beacom, in fee simple absolute) "all their right, title, and interest" in and to the tract or parcel of land containing 250 acres, which was devised by Robert Beacom, subject to the life estate of his wife, Mary Beacom, to Hamilton Beacom, with contingent limitations over as hereinbefore stated. Mr. A. C. Zollicoffer testified, in substance, that he was the attorney for the respective parties, and helped them to adjust their difficulties and differences, and advised them in the matter. The settlement was intended to be a full and final settlement "of everything between the parties." It related to and embraced the adjustment of the estates of Robert Beacom's three deceased sons, who had successively conducted the mercantile business under the firm name of Beacom Brothers; the settlement of Robert Beacom's estate and of the estate of his widow, Mary Beacom. That Amos, in right of his two wives, was entitled to two shares in the store or business of Beacom Brothers, and Robert Beacom's estate to one share. He wrote all the deeds and the agreement and also the wills. They were written and executed at the same time, as parts of one and the same transaction, and were intended and considered as a final and complete settlement. At first, in order to make the settlement, a sale of the property was proposed, (362) but finally they decided that it should be divided in specie, as was done, Clara Beacom, the plaintiff, having the choice of the parcels and taking the farm, which was considered the more valuable. Hamilton Beacom testified that the consideration of his joinder in the deed to James Amos, as trustee of his children, was the interest of Amos' wives in the store and the sum of $500, which he paid. He had nothing to do

with arranging the terms of settlement as between Clara Beacom and Annie Amos. That was done between themselves. In this connection it may be stated that a deed of settlement, dated 11 May, 1900, between Clara Beacom, James Amos, and wife, Annie Amos, of the first part, and Hamilton Beacom of the second part, was in evidence. It recites their respective interests in the estate of John E. Beacom and in the business and effects of Beacom Brothers, and the unsettled condition of those estates, and further recites the desire of the parties interested to have "a full and final settlement between themselves of their respective interests, as creditors, legatees, and devisees of the estate, and under the wills of John E., Robert and Mary Beacom, and further, that a full and final settlement had been agreed upon, and then states the terms of settlement, viz.: that Hamilton Beacom is to provide for the payment of the claims of James Amos, representing his two wives, against the estate of J. E. Beacom, amounting to $1,646.15, the claim of Clara Beacom against such estate, and all other debts of the same, and in consideration of his having complied with the agreement on his part, they convey to him all their interest in the estate of J. E. Beacom and in the mercantile business of Beacom Brothers, including their interest in the assets and property and in the good-will of the firm of Beacom Brothers, and their interest in the estate of Mary Beacom, and any claim or share Robert Beacom may have had in the estate of J. E. Beacom or in the firm of Beacom Brothers, with habendum to him, the said Hamilton Beacom, his heirs, executors, administrators and assigns forever." This deed was a part of the general settlement.

(363) It was admitted that plaintiff could not recover, as to the personalty, as she was barred by the statute of limitations, and the only property in dispute therefore, is the two lots in Henderson, N. C., which are particularly described in the deed of Clara Beacom to Annie Amos, dated 11 May, 1900.

The court charged the jury that the legal effect of the deed from the plaintiff to Mrs. Annie Amos was to pass the title in fee, and then told the jury, if they believed the evidence, their answers to the issues should be in favor of the defendant. The jury returned the following verdict:

1. Is the plaintiff owner and entitled to the possession of the land described in the complaint? Answer: No.

2. Is plaintiff owner and entitled to the personal property described in the complaint? Answer: No.

3. What is the annual rental value of said lands? Answer: $250.

Judgment was entered thereon for the defendant, and the plaintiff appealed.

T. T. Hicks for plaintiff.
J. C. Kittrell and T. M. Pittman for defendant.

WALKER, J., after stating the case: The contention of the plaintiff is that the two deeds exchanged between her and her sister, Annie Amos, operated only as a partition of the lands therein described between them, and only ascertained the several shares or portions of each of them as tenants in common of the estate devised to them by their father, and therefore, that each one of them took, not an absolute estate in fee in the part thus allotted to her by the deed from her sister, but a contingent remainder or executory devise, and consequently that each still held the estate in her several share, under the contingent limitation of the will, and it was subject to be divested or determined if she failed to survive her sister. In other words, that the estate of each in her several share was the same as was devised by the will, and not any new estate created by the deed of her sister. It may be conceded, for the sake of argument, that ordinarily a voluntary partition between tenants in common, or one accompanied by deeds, has, in law, only the effect of an assignment to each of the tenants of his several share or part of the common property, merely ascertaining and fixing the physical boundaries (364) thereof, and that no new estate is created or manufactured which was the view taken of such a partition in *Harrison v. Ray,* 108 N. C., 215; *Harrington v. Rawls,* 131 N. C., 39; *Jones v. Myatt,* 153 N. C., 229; but this concession, if carried to the fullest extent justified by those cases and others of like tenor, does not, by any means, sustain the plaintiff's contention, for in this case the parties, by their agreement for a final settlement of all their matters growing out of their rights and interests under the will of their father, and by the very terms of their deeds, have done more than merely set apart ach to the other her several parcel of the land. They have conveyed to each other all the interest and estate in the land they acquired under said will, both vested and contingent. It is expressly stated in the papers (which must be taken as parts of one and the same transaction and read and construed together) that they convey to each other an absolute estate in fee simple forever, which necessarily divests the estate of its contingent character or converts it into a vested estate in fee. In accordance with the principle declared in *Harrison v. Ray* and *Harrington v. Rawls,* they would take only the contingent estate given by their father's will, if it had been nothing more than a mere partition, unaccompanied by any conveyance of the contingent interest or of all their interest in the land so acquired, both vested and contingent. It is perfectly clear that the intention, as evidenced by the deeds, was that each should have and enjoy her several

portion as the absolute and unconditional owner thereof in fee, so that the right of survivorship created by the limitation in the will should cease and determine and an indefeasible estate should vest instead thereof. Language could not be employed which would more clearly and certainly convey this meaning than that to be found in these papers. The provision of the deed is that Annie Amos should have "the part of the land devised by the will, and conveyed to her by the plaintiff's deed, in fee simple and absolutely and so that she may hold the same in severalty, free from any claim of her sister," the plaintiff. And this idea pervades the entire series of deeds which were drown by Mr. Zollicoffer and (365) executed by the parties to effectuate their settlement, which was to be a finality. We have often decided that a deed—and the same is true of a series of deeds relating to the same continuous transaction—should be construed as a whole and according to the intention of the parties, as expressed therein, and without regard to the position of its different clauses or its formal divisions, or any technical precision or accuracy of the draftsman in framing the instrument.

This Court, in *Gudger v. White,* 141 N. C., 597, referring to and adopting what had been said many years before in *Kea v. Robeson,* 40 N. C., 373; and *Rowland v. Rowland,* 93 N. C., 214, thus stated the modern rule for the construction of deeds: "We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'" And again: "Words should always operate according to the intention of the parties, if by law they may, and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. This is the more just and rational mode of expounding a deed, for if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor." This case was followed by *Bryan v. Eason,* 147 N. C., 284, where this sensible and liberal rule of interpretation was approved and applied in the construction of three deeds, which were considered as parts of one indivisible transaction, for the purpose of deciding what estate was conveyed

thereby. See, also, *Triplett v. Williams*, 149 N. C., 394, and authorities therein cited; *Smith v. Proctor*, 139 N. C., 314; *Vickers v. Leigh*, 104 N. C., 248; *Featherstone v. Merrimon*, 148 N. C., 199; *Real* (366) *Estate Co. v. Bland*, 152 N. C., 225; *In re Dixon*, 156 N. C., 26; *Thomas v. Bunch*, 158 N. C., 175; *Highsmith v. Page, ibid.*, 226; *Acker v. Pridgen, ibid.*, 337; *Eason v. Eason*, 159 N. C., 539; they being some of the many cases in which this practical rule was applied. In *Williamson v. Bitting*, 159 N. C., 321, we said: "They (the deeds) were informally and inartificially drawn, but the intent to mortgage all he had in his father's estate, whether real or personal property, is perfectly evident. The law will not allow the plain intention to be defeated by any omission to use technical words to express it, if equivalent terms are employed for the purpose. This we held in *Triplett v. Williams*, 149 N. C., 394; *Gudger v. White*, 141 N. C., 513; and very recently in *Acker v. Pridgen*, 158 N. C., 337; *Judge Story*, in *Tiernan v. Jackson*, 5 Peters, 58, said that, 'Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the Court will give effect to it, and construe the words accordingly."

If these several instruments are viewed in the light of this settled rule, we cannot escape the conclusion that the parties intended to convey to each other, not merely the contingent interest they acquired by their father's will, but the entire, unconditional and absolute estate therein. This being so, the next question is, Could they, by deed, convey this contingent interest? The limitations under the will to the sisters were executory, that is contingent remainders, or, more precisely speaking, cross-remainders. A bare possibility cannot be transferred at law, but by a possibility we mean the interest, or chance of succession which an heir apparent has in his ancestor's estate, the expectancy which one who is next of kin has of coming in for a part of his living kinsman's estate, which a relative may have of having a legacy left to him; and, perhaps, there are other examples. They are uncertain interests and are the true technical possibilities of the common law. 2 Peere Wil., 181; *Whitfield v. Faucet*, 1 Ves., 381; Atherly on Man. Settl., 57. But executory devises and contingent remainders are not considered as mere *possibilities*, but as *certain* interests and estate. *Gurnel v. Wood*, Willis, 211; *Jones v. Doe*, 3 T. R., 93. *Judge Daniel*, speaking of these interests (367) and the cases cited above, says in *Fortescue v. Satterthwaite*, 23 N. C., 566: "In the last case the judges seem to have considered it as settled that contingent interests, such as executory devises to persons who were certain, were assignable. They may be assigned (says Atherley,

p. 55) both in real and personal estate, and by any mode of conveyance by which they might be transferred, had they been vested remainders." The validity of such an assignment of a contingent interest is fully recognized in *Bodenhamer v. Welch*, 89 N. C., 78, where it was held that the contingent remainder of a bankrupt in land passed under the deed of his assignee made in pursuance of a sale of the interest. This doctrine is approved in *Watson v. Smith*, 110 N. C., 6; *Kornegay v. Miller*, 137 N. C., 665. It is not necessary to decide in this case whether the assignment would pass a legal or only an equitable interest, for the defendant has set out the facts in his answer, and relies on them as a defense, and as said by *Justice Ashe* in *Bodenhamer v. Welch, supra,* "the defendant in such case might have defeated the action by pleading his equitable counterclaim" which was that the contingent interest had been assigned to him and he was equitably entitled thereto, and, if necessary, he might have called for the legal title. *Stith v. Lookabill,* 76 N. C., 465; *Farmer v. Daniel,* 82 N. C., 152.

But the very question involved in this case has been considered by the Court of Appeals of Virginia in *Snyder v. Grandstaff,* 96 Va., 473, and decided according to the view we have taken of the law. The facts and decision of that case are accurately stated in the syllabus as follows: "A testator devised and bequeathed his entire estate, real and personal, to his three grandchildren, to be equally divided between them, share and share alike, but on the death of either of them without issue, his or her share should pass to the survivors or survivor, and in case all died without issue, then to collateral kin. Subsequently the grandchildren divided the estate amongst themselves, and by deeds reciting the provisions of the will and the partition which they had made, and their desire to 'vest exclusive title to several parcels of land in the said parties to whom they had been assigned and allotted respectively,' each conveyed to the (368) other all of his right, title, and interest in the property allotted to such other. One of the grandchildren, in contemplation of marriage, conveyed the property so received by him to his intended wife and then married her, and shortly thereafter died without issue or possibility of issue: *Held,* the title or survivorship of the two surviving grandchildren passed by their deed to their deceased brother, in his lifetime, and by his deed is vested in his widow." If anything, the facts in this record make a stronger case for the defendant than did those in the case cited for the defendant therein. It is manifest, from a careful examination of the deeds and other relevant documents in evidence, that the parties intended to convey an exclusive and indefeasible title, each to the other. The opinion of *Judge Thomas W. Harrison* in the Virginia case we have cited, which was adopted and quoted by the Court of

Appeals, discusses the question so fully and lucidly and, too, so conclusively, that we merely refer to it for the benefit of any one who may wish further light upon the subject, and, ourselves, forbear further discussion.

It follows from what we have said that the judgment of the Superior Court is correct and should not be disturbed.

No error.

Cited: *Guilford v. Porter,* 167 N. C., 368; *Phifer v. Mullis, ib.,* 409; *Spencer v. Jones,* 168 N. C., 292; *Weil v. Davis, ib.,* 303; *Morton v. Water Co. ib.,* 588; *Scott v. Henderson,* 169 N. C., 661; *Ford v. McBrayer,* 171 N. C., 425; *Springs v. Hopkins, ib.,* 495; *Lee v. Oates, ib.,* 725, 726.

G. T. WELLS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 March, 1913.)

1. Railroads—Master and Servant—Safe Place to Work—Colaborer—Negligence—Instructions.

The plaintiff, a section hand, was injured while carrying a cross-tie over a ditch 3 or 4 feet deep, on the defendant railroad company's right of way, over which a single cross-tie had been placed as a bridge. There was evidence tending to show that two cross-ties should have been used for the purpose, and that stakes should have been driven into the ground at their ends to keep them steady; that the cross-tie over the ditch was "wobbly," and that another section hand and the plaintiff were carrying the cross-tie in question on their shoulders, and the former, in front, stepped off the improvised bridge in a negligent manner, causing the injury complained of: *Held,* (1) a motion for nonsuit was properly denied; (2) an instruction making defendant's negligence rest solely upon the steadiness of the bridge, or upon whether the colaborer did not negligently step therefrom, was properly refused.

2. Railroads—Master and Servant—Fellow-servant Act—Respondeat Superior—Interpretation of Statutes.

The charge of the court applying the doctrine of *respondeat superior,* under the fellow-servant act, where a section hand of a railroad was negligently injured while carrying a cross-tie with a fellow-servant, and under the direction of the section master, is approved under *Fitzgerald v. R. R.,* 141 N. C., 534.

3. Master and Servant—Negligence—Accident.

There being evidence of negligence on the part of the section master of a railroad company in not providing a proper method for the plain-

tiff, engaged, when injured, in carrying cross-ties across a ditch, and while under the direction of the section master, the principle announced in *Brookshire v. Electric Co.*, 152 N. C., 669, has no application, that the master will not be responsible for an accident which he could not have anticipated—a result from an unknown cause.

APPEAL by defendant from *Carter, J.*, at September Term, (369) 1912, of PENDER.

R. G. Grady and C. F. McCullen for plaintiff.
Davis & Davis, H. L. Stevens, and J. T. Bland for defendant.

CLARK, C. J. The plaintiff, a section hand, under the orders of the section master, was carrying cross-ties across a ditch 3 or 4 feet deep and 6 or 7 feet wide, and loading them on a handcar. The section master had caused one cross-tie to be laid across this ditch to be used as a bridge. There was evidence that one cross-tie was too narrow for safety; that it was not level, but wobbly, and was not kept in place by any stob, and that as the plaintiff went across, another employee carrying the front end of a tie on his shoulder and the plaintiff the rear end on his shoulder, the employee at the front end stepped off in a negligent manner, by which the plaintiff was jerked off the bridge and fell to the ground, the cross-tie which he was carrying on this shoulder (370) falling on his arm and breaking it.

The first assignment of error for failure to nonsuit need not be discussed. The second assignment of error is for refusal to charge that if the cross-tie on which plaintiff was passing "was firm and solid and did not reel or turn, then the defendant is not guilty of negligence, and the jury will answer the first issue 'No,'" was properly refused, for there was allegation and evidence of negligence both as to the width of the bridge and the conduct of the fellow-servant who was carrying the front end of the cross-tie.

The third and seventh assignments of error, that the court refused to charge that if the plaintiff was "injured by the reason of the long step of Brinkley or by slipping from the tie, the jury should answer the first issue "No," cannot be sustained, for if the conduct of Brinkley, who was carrying the front end of the tie, was negligent, the defendant was not excused; besides, there was allegation and proof tending to show further negligence in the narrowness of the bridge and from its unfixedness and from its wobbly condition.

The fourth assignment of error is because the court charged, "By virtue of this statute any negligence on the part of a fellow-servant of the plaintiff, on the part of A. P. Brinkley, or of the section boss, Captain Brinkley, which resulted proximately in the injury of the plain-

tiff, would be attributed or imputed to the defendant." The charge of the court was correct. Pell's Revisal, 2646; *Fitzgerald v. R. R.*, 141 N. C., 534; *Sigmon v. R. R.*, 135 N. C., 181.

The sixth assignment of error is to the following part of the charge: "It is the duty of the employee to observe, and he is chargeable with those conditions he could discover by the exercise of ordinary care, but he is not guilty of contributory negligence because he works in the presence of danger, unless it is so obvious that a man of ordinary prudence would have refused to do so." This charge is amply supported by the uniform decisions of this Court.

In this case, Brinkley, the fellow-servant, was carrying on his shoulder the front end of the tie, and there was evidence which tended to show that by suddenly making a long step off the bridge and a little to one side, he jerked and overbalanced the plaintiff, who was (371) carrying the rear end of the tie, and caused him to fall with the tie on his shoulder and break his arm. There was evidence also tending to show that the bridge was unsteady and also that it was too narrow, and if these caused or contributed to the injury, it was the negligence of the section master, who might have placed two ties across the ditch and have fastened them down so as to be safe.

The defendant relies upon *Simpson v. R. R.*, 154 N. C., 51, and *Brookshire v. Electric Co.*, 152 N. C., 670. But these cases are not analogous. In the former case the plaintiff was injured by a tie falling from a pile of ties on the car, and the Court said that in the absence of evidence that the ties were carelessly piled, it was bound to regard the injury as the result of an accident. In *Brookshire v. Electric Co.* the evidence failed to show any negligent act on the part of the company or of the fellow-servants who were engaged with the plaintiff in carrying a pole. In this case there was evidence of the negligent conduct of the fellow-servant in stepping off the bridge by a long stride and to one side instead of straight forward, and also of the section boss is not making the bridge wide enough for the occasion or sufficiently steady to be safe. The case was properly submitted to the jury under a charge, in which we find

No error.

J. H. JOHNSON v. J. J. CARSON.

(Filed 5 March, 1913.)

Penalty Statutes—Fertilizers—Qui Tam Actions—Cotton-seed Meal—Branded and Tagged—Intent—"Removal"—User—Seller—Interpretation of Statutes.

Statutes should be construed to ascertain their intent and to remedy the evil, and in this *qui tam* action to recover the penalty prescribed by Revisal, sec. 3956, for the unalwful removing of cotton-seed meal in unbranded bags and without tags, as required by section 3957, these sections, construed with section 3960, are held to mean that such removal relates to those who "sell or offer for sale any cotton-seed meal without having the proper tags attached," and not the farmer, for whose protection the statutes were enacted, so as to make him liable for removing from the depot bags of cotton-seed meal, to be used under his crops, and which had been bought by and shipped to him for that purpose.

APPEAL by plaintiff from *Cline, J.*, at September Term, 1912, (372) of PITT.

H. A. Gilliam and L. I. Moore for plaintiff.
Harry Skinner and T. J. Jarvis for defendant.

CLARK, C. J. This is an action for the recovery of a penalty of $10 per sack for the removal by the defendant of 196 bags of cotton-seed meal shipped by the Southern Cotton Oil Company to the defendant at Bethel, N. C., and removed by him therefrom to his farm and used thereon, in alleged violation of Revisal, 3956. The shippers of this identical cotton-seed meal were subjected to the payment of said penalty in *Carson v. Bunting,* 154 N. C., 530. This is a *qui tam* action for the same penalty against the purchaser.

The cotton-seed meal was shipped 8 January, 1909, by the Southern Cotton Oil Company from its factory at Conetoe, N. C., to the defendant at Bethel, N. C., to be used by him as fertilizer. None of the bags had branded thereon or had attached to them any labels, stamps, or tags containing the data required by Revisal, 3957. By consent, a jury trial having been waived, the judge found the facts, which are that the cotton-seed meal was removed from the station at Bethel by the defendant to his farm, and that he did not at that time have knowledge that the required data was not stamped or labeled thereon, and that the fertilizer was subsequently used on the defendant's farm for agricultural purposes.

Upon these facts, the court correctly held as a matter of law that the defendant was not liable to the penalty sued for. The question presented is simply whether a farmer who buys fertilizer, not for sale, but for

use on his own crops, is subject to the penalty prescribed in Revisal, 3960, if he takes it home, or removes it from the station to his farm.

Revisal, 3957, makes cotton-seed meal sold for use as fertilizer subject to inspection tax unless sold to manufacturers to be used (373) in manufacturing fertilizers, and adds: "All cotton-seed meal offered for sale shall have plainly branded," etc. "No person or persons, firm or corporation shall offer for sale any cotton-seed meal except as provided in preceding section." Revisal, 3958. Revisal, 3960, provides: "Any person or persons, firm or corporation who shall sell or offer for sale any cotton-seed meal without having the proper tags attached thereto, etc., shall be liable to a tax of $10 for each separate bag, barrel, or other package sold or offered for sale or removed, to be recovered by any person who may sue for the same, and all cotton-seed meal so sold or offered for sale shall be subject to seizure."

It is clear, from these sections, that the penalty applies to the manufacturer or any one, either as principal or agent, who sells or offers to sell, or remove, and that the word "remove" does not apply to the purchaser who received the fertilizer not for sale, but for use, and when the only removal by him is taking the fertilizer from the railroad station and then distributing the same under his crops.

In *Carson v. Bunting,* 154 N. C., 520, *Walker, J.,* in his able concurring opinion says: "The idea being to protect the unwary farmer against the purchase of spurious articles, to shield him from the imposition and fraudulent practices and devices of the wicked and designing manufacturer." The word "removal" applies only to persons who shall "sell or offer for sale." If the act gave a penalty against the purchaser who buys for his own use, it would not be a protection to the farmers, as intended, but a snare and a delusion, and would subject them and their hands and tenants to a penalty for being the victims of the fraud or violation of law committed by the sellers.

Among the many well-settled rules for the interpretation of statutes are that we must consider the intent of a statute and the evil to be remedied, and to so construe it as to execute its purpose, which will be drawn from the terms of the statute and consideration of the context. It cannot be denied that by this test the intent of the statute was to protect and not to punish the purchaser, but to make the manufacturer or seller liable for noncomplaince with the statutory requirement to furnish data attached to each barrel, or bag, or package, giving the constituents of the fertilizer. Revisal, 3960, provides that (374) any one "who shall sell or offer for sale" any cotton-seed meal without having the proper tags attached thereto, etc., shall be liable for a tax of $10 for each separate bag, barrel, or other package sold, offered

for sale, or removed, to be recovered by any person who may sue for the same. The penalty is thus restricted to those who "shall sell or offer for sale" such fertilizer without having complied with the terms of the statute.

So plain a proposition hardly needs any citation of authority. Many cases are cited in Black Interpretation Laws, sec. 29. An ancient case, exactly in point, is given by *Puffendorf De Jure Nat. L.*, 5, c. 12, s. 8, who mentions a law of Bologna, which enacted that "whoever drew blood in the streets should be punished with the utmost severity." It was held thereunder that this law did not apply where a surgeon bled a man who had fallen down in the streets in a fit. The plaintiff here seems to go further, and seeks to hold liable not the surgeon, but the purchaser whose blood has been drawn by the shipment to him of fertilizers not safeguarded and guaranteed as to its constituents in the manner required by the statute.

The court below finds as a fact that the defendant did not know at the time of the removal of the fertilizer from his station to his farm that the fertilizer had not been properly tagged. But if he had, under the very terms, as well as the intent, of Revisal, 3960, such "removal" by him would not have made him subject to the penalty unless the cotton-seed meal was "sold or offered for sale" by him without having the proper tag attached thereto.

The plaintiff rests his case, indeed, upon the following language in Revisal, 3956, which provides: "Every merchant, trader, manufacturer or agent who shall sell or offer for sale any commercial fertilizer or fertilizer material without having attached thereto such labels, statements, and tags as are required by law, or who shall use the required tags the second time to avoid the payment of the tonnage charge, and *every person who shall remove any such fertilizer,* shall be liable to a penalty of $10 for each separate bag, barrel, or package sold or
(375) offered for sale *or removed,* to be recovered by any person who may sue for the same"; and upon similar language in 3960. But it is apparent from what we have said as to the context and purpose of the act that the words in italics refer to "any *such* person" who for the purpose of selling or offering for sale, or to evade the inspection tax, shall remove the fertilizer or cotton-seed meal; as, for instance, by sending it from the factory for shipment, or to another point, to be offered for sale or sold.

No error.

A. L. BLOW ET AL. v. F. C. HARDING ET ALS.

(Filed 5 March, 1913.)

Judgments—Liens—Obligations Incurred Before 1868—Homestead—Limitation of Actions.

A judgment obtained in 1873 on an obligation incurred prior to the Constitution of 1868, in this case as surety on a guardian bond, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations.

APPEAL by plaintiffs from *Cline, J.*, at September Term, 1912, of PITT.

Thomas J. Jarvis and Winston & Biggs for plaintiffs.
Gulley & Son for defendants.

CLARK, C. J. On 6 February, 1866, J. J. Perkins became surety on a guardian bond. Suit was brought thereon and judgment was rendered at Fall Term, 1873, of Pitt. At that time J. J. Perkins was seized and possessed of Lot No. 33 in the town of Greenville.

W. M. Brown, administrator of Short, obtained judgment against said J. J. Perkins, Spring Term, 1871, of Pitt. Execution issued thereon, and on 15 March, 1871, the homestead of said Perkins was allotted, which embraced aforesaid Lot No. 33. This judgment (376) by successive transfers became the property of R. A. Tyson.

On 24 July, 1893, J. J. Perkins by deed conveyed to Lucy G. Bernard a certain part of Lot No. 33, and on the same day R. A. Tyson executed a quitclaim deed to Lucy G. Bernard for said lot of land, both which deeds were registered that day, and she took possession of the land.

J. J. Perkins died in 1911 and on 11 October, 1911, the plaintiffs, being the owners of both judgments against him which had been rendered at Fall Term, 1873, began this suit to subject said lot to sale to satisfy their judgment.

The only question involved is whether the judgment against Perkins obtained at Fall Term, 1873, continued to be a lien upon the land in 1911. A docketed judgment is a lien for ten years only, with well defined exceptions. Revisal, 574; *Pipkin v. Adams*, 114 N. C., 201; *Bernhardt v. Brown*, 122 N. C., 594; *Harrington v. Hatton*, 130 N. C., 90; *Wilson v. Lumber Co.* 131 N. C., 167.

Revisal, 574, provides that the time during which the judgment creditor shall be prevented by statute or judicial order from enforcing the judgment shall not be counted as any part of the ten years. This judgment, obtained at Fall Term, 1873, was upon a liability incurred prior

to the Constitution of 1868, when J. J. Perkins signed the guardian bond as surety. Therefore the collecton of the judgment could have been enforced against this property notwithstanding the allotment of the homestead under another judgment. *Earl v. Hardie,* 80 N. C., 177; *Long v. Walker,* 105 N. C., 90. *A fortiori,* if the judgment could have been collected out of property other than that covered by the homestead, the lien of the judgment expired at the end of the said ten years.

There was no suspension of the statute of limitations as to this judgment, because its lien could have been enforced at any time up to the time it expired in 1883. *Cotton v. McClenahan,* 85 N. C., 255; *McDonald v. Dickson, ib.,* 253; *Cobb v. Hallyburton,* 92 N. C., 655. The judgment creditor was not restrained from collection by operation of
(377) law nor by an order of court, but by his own want of diligence. *Lyons v. Russ,* 84 N. C., 588.

The judgment of his Honor that the plaintiffs cannot recover is Affirmed.

SIDNEY DANIEL v. E. S. DIXON ET AL.

(Filed 5 March, 1913.)

1. Evidence—Questions and Answers—Cumulative Evidence—Appeal and Error.

It is the answer to a question, and not the question asked, which makes the evidence; and when it does not appear on appeal what the answer, which has been ruled out, would be, or when the testimony sought is competent and is given in the evidence elsewhere, there is no reversible error.

2. Evidence—Hearsay—Res Inter Alios Acta.

It is proper for the trial judge to exclude from the evidence declarations of third persons as hearsay, and also acts of the same nature which are inadmissible as leading the court into many collateral inquiries, and which fall within the rule of *res inter alios acta.*

3. Deeds and Conveyances—Mental Incapacity—Evidence, Nonexpert.

The rule of evidence, that the mental capacity or incapacity of one whose deed is sought to be set aside for mental incapacity to make it may be testified to by nonexpert witnesses, is approved.

4. Issue Determinative—Other Issues—Harmless Error.

In an action to set aside a deed for the mental incapacity of the grantor to make it, where such incapacity is established by the jury, any error committed in the refusal of the court to so frame and word an issue as to show whether a consideration was paid for the deed, is harmless error so far as it may affect the validity of the deed.

5. Instructions—Substantially Given—Requests, Argumentative—Appeal and Error.

While defendant's requested instruction in this case was argumentative, and may well have been refused on that account, yet it was substantially given by the judge in his own language, free from error, without materially weakening its force, and on that account its refusal was not erroneous.

6. Instructions—Issue Determinative—Other Issues—Harmless Error.

If in an action to set aside a deed for mental incapacity involving other issues, the answer to the issue as to the grantor's incapacity is sufficient to set the deed aside, any error committed by the trial judge in his instruction to the jury upon other issues, having no bearing upon the first, is harmless.

7. Verdict, Directing—Conflicting Evidence—Appeal and Error.

A prayer for instruction to direct an answer to an issue upon which the evidence is conflicting should be refused.

8. Instructions—Deeds and Conveyances—Mental Incapacity.

The charge of the court to the jury upon the issue of the mental incapacity of a grantor whose deed is sought to be set aside on that ground is approved under the authority of *In re Thorp*, 150 N. C., 487, and other like cases.

9. Instructions Requested by Jury—Deeds and Conveyances—Issues—Mental Capacity—Appeal and Error.

In this action to set aside a deed for mental incapacity of the grantor, undue influence, etc., after retiring to their room the jury returned and requested the court to instruct them upon the effect of their answering the first issue in the affirmative: *Held*, no error for the judge to instruct them that if the grantor did not have sufficient mental capacity the deed would be void, otherwise it would be valid, it being equivalent to an instruction that they need not answer the second, and other issues if they answered "Yes" to the first one; but if they answered it "No," they should then consider and answer the others.

APPEAL by defendants from *Bragaw, J.*, at November Term, 1912, of PITT. (378)

This action was brought to cancel two deeds made by Mrs. A. G. Daniel to her daughter, Ida Dixon, on the ground of mental incapacity of the grantor and undue influence exercised in procuring the deeds. Issues were submitted to the jury, and answered as follows:

1. Was Mrs. A. G. Daniel, the grantor named in the paper-writings referred to in the pleadings, so lacking in mental capacity, 30 November, 1904, that she could not make a deed? Answer: Yes.

2. Did the defendants procure the said paper-writings to be signed by Mrs. A. G. Daniel by fraud or undue influence, as (379) alleged? No Answer.

3. Was the consideration for the deed in fact paid or performed? No answer.

4. What has been the average rental value of the lands described in the pleadings from 30 November, 1904? Answer: $150.

Judgment for plaintiff, and appeal by defendant.

Julius Brown and Ward & Pierce for plaintiff.

Jarvis & Blow, Harry Skinner for defendant.

WALKER, J., after stating the case: There are seventeen exceptions to evidence, and all of them fall within one of three classes: (1) If a question, to which objection is taken, is not answered, and there is nothing to show what evidence was expected to be elicited, the objection fails. *S. v. Leak,* 156 N. C., 643. (2) If a competent question is objected to and ruled out, but is afterwards asked and answered, the same result follows. *Gossler v. Wood,* 120 N. C., 69. (3) Declarations of third persons, which are excluded as hearsay, and acts of the same nature which are inadmissible, as leading the court into many collateral inquiries, and excluded under the rule expressed in the law maxim, *res inter alios acta alteri nocere non debet* (Things done between strangers ought not to injure those who are not parties to them). Co. Litt., 132; McElvy on Evidence, pp. 129 and 203.

It is not what is asked a witness that constitutes evidence, but the answer, viewed in connection with the question; and if we do not know what the answer will be, we cannot say whether or not it would be competent, and, therefore, whether any harm has befallen the party by its exclusion (*Bost v. Bost,* 87 N. C., 477); and so, if a rejected question is afterwards answered, the party has suffered no harm, for he has the full benefit of the evidence, the same as if it had originally been admitted. One answer is sufficient, as the evidence does not acquire any greater force or weight, in the view of the law, by repetition.

(380) It is not necessary to consider these exceptions *seriatim,* as they are plainly untenable under the rules above stated, and are, therefore, overruled collectively. In doing this, we concede the principle and are not inadvertent to it, that mental capacity or incapacity may be shown by opinion or nonexpert testimony. While the writer did not altogether agree with the Court in some of the cases establishing the rule, it has been settled that such testimony is inadmissible. *Whitaker v. Hamilton,* 126 N. C., 465; *In re Peterson,* 136 N. C., 22; *Brazille v. Barytes Co.,* 157 N. C., 454; *Taylor v. Security Co.,* 145 N. C., 383.

It was not reversible error to refuse the motion of defendant to add the words "or waived" to the third issue, as the jury found with the plaintiff upon the first issue, which finding was decisive of the case, and

the error, if any, was harmless. There was no use in inquiring whether the condition of the instrument had been waived, if it was not her deed; and the same may be said as to the nineteenth exception, which was taken to the submission of the second and third issues. It was immaterial to inquire as to fraud or undue influence if Mrs. Daniel did not have sufficient mental capacity to execute the deed. *Perry v. Insurance Co.*, 137 N. C., 402; *Sprinkle v. Wellborn*, 140 N. C., 163.

Defendant's first and third prayers for instructions were argumentative, and therefore might well have been refused, but they were substantially given in the charge. The presiding judge was not required to pursue the language of the prayers. He had the right to choose his own words in stating the law arising upon the evidence, and if a proper instruction embodied in a prayer is given in substance and effect, without its force being materially weakened by reason of any change in the phraseology, it is all the law requires and all the party can ask. *Lyne v. Telegraph Co.*, 123 N. C., 129; *Griffin v. R. R.*, 138 N. C., 55. Referring to this subject in *Cogdell v. R. R.*, 132 N. C., 852, the Court laid down this rule: "It is well settled that the court is not required to charge the jury in the very words of a prayer for instruction; but if the prayer contains a correct statement of the law as applicable to the facts of the case, the court must give it at least substantially, and cannot substitute an instruction of its own for it, if thereby the instruction as requested to be given is (materially) weakened or diminished in (381) its force. While the court is not required to use the words of the prayer, it must not change the substance of it in a way calculated to impair its force. The law does not regard the form, but even the form should not be so modified as to impart to the instruction less weight than it would have with the jury if given as it was submitted to the court: *Provided, always,* that the instruction, as asked, is in itself correct with reference to the case presented by the proof." But the court did not, in this case, violate this rule, as the charge substantially and clearly stated the law, and all the law, applicable to the facts.

The defendants further requested the court to direct the jury to answer the second issue "No" and the third issue "Yes." This prayer was properly refused, as there was some evidence to support the plaintiff's contention as to these issues (*Bellamy v. Andrews*, 151 N. C., 256; *Pritchard v. Smith*, 160 N. C., 79; and furthermore, the error, if any, in refusing to give the instruction was cured by the verdict of the jury upon the first issue, which alone is sufficient to sustain the judgment. *Sprinkle v. Wellborn, supra; Perry v. Insurance Co., supra.* The exception to the charge of the court was properly overruled, as the court fully instructed the jury as to the law, and especially were the instructions

upon the question of mental capacity in accordance with the doctrine as settled by this Court in numerous cases. *Paine v. Roberts,* 82 N. C., 453; *Horah v. Knox,* 87 N. C., 489; *Bost v. Bost, ibid.,* 479; *Crenshaw v. Johnson,* 120 N. C., 274; *Whitaker v. Hamilton,* 126 N. C., 465; *In re Snow's Will,* 128 N. C., 102; *Cameron v. Power Co.,* 138 N. C., 365; *Sprinkle v. Wellborn,* 140 N. C., 181; *In re Thorp,* 150 N. C., 487. The charge in this case is substantially the identical one given by the court in the case last cited by us. The jury have found under the charge that the grantor did not have sufficient mental capacity to know and understand what she was doing; what property she owned and wished to convey; how and to whom she was conveying it; and, further, that she did not understand the nature of the act in which she was engaged and its extent and effect. The charge is further sustained by *Horne v. Horne,* 31 (382) N. C., 106; *Cornelius v. Cornelius,* 52 N. C., 595; *Lawrence v. Steel,* 66 N. C., 586, which are cited in support of the similar charge in the case of *In re Thorp, supra.*

The jury, after retiring to their room, came back into court and requested the judge to instruct them as to the effect of answering the first issue in the affirmative. We do not see how either of the parties could be harmed by the explanation of the court. The response of the judge was, that if she did not have sufficient mental capacity to execute the deed, it would be void, and if she did, of course, it was valid. He had so substantially charged the jury before. The first issue was negatively worded, and the jury were practically told that they need not answer the second and third issues if their answer to the first issue was "Yes," but if it was "No," they should then consider and answer the other issues as to undue influence and compliance with the condition of the deed.

The other exceptions are merely formal, and are fully covered by what we have already said.

No error.

Cited: Armfield v. R. R., 162 N. C., 29; *Berbarry v. Tombacher, ib.,* 499; *Daniel v. Dixon,* 163 N. C., 138.

W. J. ALFORD v. B. M. MOORE.

(Filed 5 March, 1913.)

1. **Trusts and Trustees—Mortgages—Transactions—Fraud—Presumptions—Rebuttal—Burden of Proof.**

The presumption of fraud arising from a transaction between a mortgagor and mortgagee whereby the latter has the former to reconvey the mortgaged lands, disappears when it is shown, with the burden on the mortgagee, that the transaction was fair and honest, free from undue influence, and that the mortgagee assented thereto at the request of the mortgagor, and did not use his power and position to drive an unfair bargain.

2. **Issues Tendered and Refused—Appeal and Error.**

An issue tendered a party litigant which is not sufficiently broad and comprehensive to be determinative, and is embraced in an issue submitted, is properly refused.

3. **Issues—Admissions—Appeal and Error.**

An issue which is covered by an admission of the parties to an action is immaterial, and when tendered, its refusal is not error.

4. **Instructions—Assuming Facts—Appeal and Error.**

A requested instruction which assumes any fact at issue to have been proved should be refused.

5. **Issues—Rents and Profits—Ownership of Lands—Appeal and Error.**

An issue tendered as to rents and profits of lands in dispute becomes immaterial when the jury, under a correct instruction, and from the evidence, has found the title thereof to be in the adverse party against whom they are claimed.

APPEAL by plaintiff from *Daniels, J.*, at October Term, 1912, (383) of FRANKLIN.

This action was brought to enjoin the sale of a tract of land under the power contained in a deed of trust, to cancel certain other deeds, for an accounting, and for the redemption of the land, this being the relief appropriate in the case under the general prayer in the complaint. Plaintiff had been the tenant of the defendant, B. M. Moore, for many years prior to 1 January, 1895, of the land in controversy, when it was agreed between them that Alford should purchase the land on easy terms. Defendant then conveyed to him the tract of land, containing 687 acres, and certain personal property, for $9,000, of which $8,000 was the price of the land. Alford was allowed forty-one years to pay the purchase money, he being required to pay only the interest for the first five years and thereafter the interest and $250 on the principal. No cash payment

was made. Alford executed a deed of trust on the land to secure the purchase money. Plaintiff having paid practically nothing on the principal of the debt, he requested Moore to take the land back and convey to him 145 acres of the tract, on a credit of ten years, for $3,412. Deeds were executed accordingly, plaintiff reconveying to Moore the original tract of 687 acres, and Moore conveying to him the 145 acres, but the transaction was not then consummated, as plaintiff had before conveyed to his brother, P. H. Alford, a one-half interest in the 687 acres, and the latter would not consent to release his interest in it to Moore, whereupon,

(384) at the request of plaintiff, the land was advertised under the power of sale, but before the sale of the land, P. H. Alford agreed to ratify the reconveyance to Moore for $210, which was paid. Plaintiff executed a deed of trust on the 145 acres to secure the purchase money agreed to be paid for that tract, and all the deeds were registered and the advertisement of the sale was withdrawn. This was done on 6 September, 1905. About six years later, plaintiff not having paid any of the principal of the new debt and only a small part of the interest, the tract of 145 acres was advertised for sale by the trustee, when plaintiff commenced this action and prayed that the sale be enjoined and for general relief, as above stated.

The court submitted to the jury the following issue: "Was the transaction of 6 September, 1905, whereby the trustee and W. J. Alford conveyed to defendant Moore the entire tract of land, and Moore conveyed to the plaintiff Alford 145 acres, unfair and oppressive?" to which the jury answered "No."

The plaintiff tendered the following issues, which the court refused to submit: "(1) Was the consideration for the deed of 6 September, 1905, a full and fair price for the property? (2) What sum is now due to the defendant, Ben M. Moore, upon the purchase price for said land? (3) What is the annual rental value of the mill and farm other than the 145 acres for the last seven years?" He also requested the court to charge the jury that, upon all the evidence, if believed, they should answer the issue "Yes." This prayer was refused.

The judge charged the jury as follows: "It appears in this case that the plaintiff, at the time he bought the 687-acre tract, paid nothing on the purchase price, and up to September, 1905, had not reduced the amount due. Therefore, if the jury shall find that at the expiration of the ten years the plaintiff went to the defendant Moore and asked him to take the land back and cancel the debt and sell him a smaller tract, and that in pursuance of this request by plaintiff, the defendant Moore, without fraud or oppression, agreed to take back this 687 acres and cancel the debt, amounting to more than the purchase price, and that

the debt then due was a full and reasonable value, and he further agreed to sell him 145 acres on ten years time—if you shall find these as facts, and that in pursuance of the request of plaintiff, and (385) without any coercion on the part of Moore, this agreement was carried out, then there would be nothing unfair in the transaction, and you will answer the issue 'No.'"

Judgment was entered for the defendant upon the verdict and the plaintiff appealed.

W. M. Person and T. T. Hicks for plaintiff.

Bickett, White & Malone, Spruill & Holden, and W. H. Yarborough for defendant.

WALKER, J., after stating the case: The testimony in this case is very voluminous, covering more than one hundred pages of the record. We have examined it carefully and have concluded that the judge might well have charged the jury that if, therefrom, they found the facts to be as stated by the witnesses, their verdict should be for the defendant, provided he paid full value for the land. But surely the plaintiff cannot complain that the evidence was submitted to the jury under the instructions set out in the case. The jury have found that there was no coercion or undue influence by the defendant, B. M. Moore; that the amount paid by him for the land in the transaction of 6 September, 1905, was the full and reasonable value thereof; that the reconveyance was made to the defendant, not by the use of any influence by him upon the plaintiff, but at the latter's request, and that the plaintiff had paid nothing on the purchase money. The court placed the burden upon the defendant to satisfy the jury that he took no advantage of his position as mortgagee to repurchase the land, and that the transaction in which he acquired it was *bona fide* and free from coercion, and that he paid full and fair value for the land.

The law governing this case has been firmly and finally settled by *McLeod v. Bullard,* 84 N. C., 516, in which the rule, as formerly adopted in *Whitehead v. Hellen,* 76 N. C., 99, is thus stated: "Courts of equity look with jealousy upon all dealings between trustees and *cestuis que trustent;* and if the mortgagor had by deed released his equity of redemption to his mortgagee, we should have required the purchaser to take the burden of proof and satisfy us that the man he had in his power, manacled and fettered, had without undue influence (386) and for a fair consideration released his right to redeem." *Lea v. Pearce,* 68 N. C., 76; Bigelow on Fraud (Ed. of 1890), pp. 261 and 295. In *Smith v. Moore,* 142 N. C., at p. 296, speaking of this principle of equity, the Court said: "When a party, complaining of a particular

transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion, or, it is often said, a presumption of fraud—a suspicion or presumption, arising as matter of law, that the transaction brought to the notice of the court was effected by fraud, or, what comes to much the same thing, undue influence, by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable. 1 Bigelow on Fraud, p. 261 *et seq.* This presumption is raised, where there have been dealings between the parties, because of the advantage which the situation of the parties respectively gives to one over the other. The doctrine rests on the idea, not that there actually was, but that there may have been fraud, and an artificial effect is given to the fiduciary relation beyond its natural tendency to produce belief of the fact that fraud really existed. *Lee v. Pearce, supra.*" Numerous cases in this Court, decided since *McLeod v. Bullard,* have followed that case and applied the rule. *Brown v. Mitchell,* 102 N. C., 347. As the jury have found that the transaction was fair and honest and actually free from the exercise of any undue influence, and especially as it appears that defendant did not use his power and position as mortgagee to drive an unfair bargain with the plaintiff, but acted solely upon the latter's initiative and at his express request, the presumption of fraud disappears and the case of the plaintiff is left without any foundation.

(387) The first issue tendered by plaintiff was embraced by the issue which the court submitted. It was but one of the elements involved in that issue, and was not broad and comprehensive enough, when standing by itself, to be determinative. He had the full benefit of it under the issue submitted, which is sufficient. *Belding v. Archer,* 131 N. C., 287; *Ratliff v. Ratliff, ibid.,* 425; *Coal Co. v. Ice Co.,* 134 N. C., 577; *Grocery Co. v. R. R.,* 136 N. C., 396; *Deaver v. Deaver,* 137 N. C., 240; *Hatcher v. Dabbs,* 133 N. C., 239. As to the second issue he tendered, the record shows conclusively that the amount due to Moore was admitted, and the issue was, therefore, immaterial.

The court could not have given the instructions requested by the plaintiff without passing upon the facts. The whole inquiry was directed to the validity of the transaction of 6 September, 1905, when the 687-acre tract was reconveyed and plaintiff received a deed for the smaller tract

at his request, and the rental value of the mill and farm since that time, referred to in the third issue tendered by plaintiff and in his prayers for instruction, was an immaterial fact, for the jury having found that the transaction was valid, the defendant, B. M. Moore, was entitled to the rents, it being his own land.

We do not perceive any error in the other rulings to which exceptions were taken.

No error.

Cited: Lloyd v. Venable, 168 N. C., 536.

THOMAS H. BULLOCK v. THOMAS J. BULLOCK.

(Filed 5 March, 1913.)

Deeds and Conveyances—Agreement to Stand Seized to the Use—Life Estates—Instructions for Jury—Tenants at Will.

A father conveyed his home to his son, and ten days thereafter received from his son a paper-writing, under which the former claims a life estate, which partly reads as follows: "In consideration of the deed to our home, I hereby state that by mutual consent and agreement my father will act as guardian, and his rulings shall be final . . . the house to be a home for my father, etc. . . . It is expressly understood that said property is not to be rented, mortgaged, or sold." This was signed by the son as the "holder of the deed." There were no words of conveyance in or seal to the instrument. Gathering the intent from the paper-writing and from the evidence in this case, it is *Held,* that a question was raised for the determination of the jury as to whether the defendant stood seized of the use of the property for the benefit of the parties named in the instrument for life, and it was error for the court to instruct the jury that the writing created a license terminable at will upon reasonable notice.

APPEAL by plaintiff from *Daniels, J.,* at October Term, 1912, (388) of VANCE.

T. T. Hicks for plaintiff.

T. M. Pittman and A. C. & J. P. Zollicoffer for defendant.

CLARK, C. J. This is an action by a father against his son to set aside his deed to his son on the ground of fraud. The jury found this issue against the plaintiff. The plaintiff further alleged an estate for life in the property by virtue of the following agreement:

To Whom it May Concern: This is to certify that I, Thomas J. Bullock, in consideration of the deed to our home, the same being in my

name, do hereby state that by mutual consent and agreement my father, Thomas H. Bullock, will act as guardian, and his rulings shall be final. That said house shall always be a home for the comfort and enjoyment of my father, Thomas H. Bullock, and Mrs. Nannie A. Bullock, and for my brothers, Henry B., Willie E., and for my sisters, Maggie J., the son of the deceased, Robert L. Owens, Mrs. Frances Thompson, and Sallie. The guardianship of said property shall be handed down to the next oldest living sister or brother, with the same authority vested in him or her as is above set forth. It is to be expressly understood that said property is neither to be rented or mortgaged nor sold. This testament is to remain at home, in the possession of the guardian, as a code whereby he or she may be directed as guardian from time to time, as the case may be.

Given under my hand, this 15 October, 1909, at Henderson, North Carolina.

THOMAS J. BULLOCK,
Holder of the Deed.

(389) The land in controversy was conveyed to the plaintiff August, 1902. On 5 October, 1909, he conveyed it to the defendant. On 15 October, 1909, the defendant delivered to the plaintiff the above instrument. The plaintiff testified that he had paid something on the land and that some of his other children had paid something thereon and the defendant the balance. The defendant testified that he had paid all the purchase money except a very small sum, and the deed had been made to his father in 1902 at his instance, and that the conveyance by his father to him in 1909 was in pursuance of the original understanding, and because of his payment of substantially all the purchase money.

On this second cause of action the court submitted this issue: "Has plaintiff any estate in the land described in the complaint under the paper writing from defendant to the plaintiff, dated 15 October, 1909?" Under the direction of the court, the jury answered this "No; a license terminable at will, upon reasonable notice." To that instruction exception was taken. The court entered judgment against the plaintiff.

The above instrument is very inartificially drawn. It was not a conveyance, because there are no words of conveyance and no seal. But from the recital therein, "*in consideration* of the deed to home" and "by mutual consent and agreement," and the words at the end describing the defendant as "holder of the deed," and upon the evidence, it might well be inferred that the intention of the parties was that the defendant should stand seized of the premises for the benefit of himself and the other parties named therein, during their lifetime. The intention must be gathered, not only from the face of the writing, which itself is not clear, but from the evidence in regard to the transaction. We think

this should all have been submitted to the jury and that the judge should not have held as a matter of law that the agreement was a mere license, revocable at will of defendant.

The case will therefore go back for a new trial upon this last issue. The costs of this Court will be divided.

Partial new trial.

(390)

T. L. HOAGLIN AND S. D. HOAGLIN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 13 March, 1913.)

1. Telegraphs—Service Messages—Negligence.

Where a telegraph company received a telegram for transmission and delivery and then finds that owing to an unavoidable occurrence it is unable to do so, it is its duty to notify the sender, and its failure in this duty is evidence of negligence.

2. Telegraphs—Failure in Delivery—Negligence—Evidence—Prima Facie Case.

Where the failure of a telegraph company to deliver a telegram which it has accepted for transmission is shown a *prima facie* case of negligence is made out, which may be rebutted by evidence on behalf of the company showing that it had exercised due care, or was prevented from delivering it by causes over which it had no control.

3. Telegraphs—Service Messages—Unavoidable Delays—Notify Sender—Free Delivery Limits—Negligence.

Where a telegraph company has accepted a message for transmission and has necessarily sent it to an intermediate station, and the operator at the latter place finds that it cannot be forwarded on account of an unavoidable accident to the line, it is his duty to send a service message to the sending office so that the sender may be notified; and where this is not done, and damages are proximately caused, the defendant cannot excuse itself from liability merely by shownig that the sender lived beyond the free delivery limits, without showing that it reasonably endeavored to find him within said limits, or that he was not therein.

4. Telegraphs—Unavoidable Interruptions—Repair of Lines—Negligence—Evidence.

While a telegraph comany is not responsible for delays due to unavoidable interruptions in the working of its lines, such as those resulting from storms or atmospheric disturbances, or any other causes over which it has no control and against which, in the exercise of ordinary prudence and foresight, it was not reasonably practicable to guard, it must, under such conditions, make diligent effort to remove the obstruction and restore its line to a normal condition, so it can perform its usual functions.

5. Telegraphs—Negligence—Unavoidable Delay—Service Message—Issues—Proximate Cause—Instructions.

Where in an action for damages against a telegraph company there is evidence of the defendant's negligence in failing to deliver a message with reasonable promptness, upon which an issue has been submitted to the jury, and there is further evidence of negligence on the part of the defendant in not sending a service message to notify the sender, and that if the sender had been so notified he could have used other means of communication which would have avoided the injury, upon which no issue was submitted, it is reversible error for the judge to charge the jury to answer the issue "Yes" if they found the service message had been sent: (*a*) it excluded the question of proximate cause and misled the jury; (*b*) it was for the jury to decide whether other means of communication were available, the use of which would have avoided the injury, and whether the sender would have used them; (*c*) or whether the service message could reasonably have been delivered to the sender under the circumstances.

6. Telegraphs—Negligence—Instructions — Appeal and Error — Indivisible Verdict—New Trial—Practice.

Where there are two elements of negligence arising in an action and blended in the issue, and the court charges the jury incorrectly as to one of them, so that this Court may not know with certainty that the jury were not influenced by the error, the verdict being indivisible, a new trial will be granted.

7. Telegraphs—Service Messages—Negligence—Separate Issues.

Where in an action against a telegraph company two acts of negligence are alleged, with evidence tending to establish each of them, one being the negligent failure of the defendant to transmit and deliver the message and the other relating to the necessity for a service message to inform the sender that the message could not be delivered owing to the unavoidable interruption of the lines, the plaintiff claiming that he could satisfactorily have used other means of communication, it is better to present the two questions of negligence in separate issues.

(391) APPEAL by defendant from *Foushee, J.*, at May Term, 1912, of MECKLENBURG.

These two actions were brought to recover damages for negligently failing to transmit and deliver a telegraphic message sent by the plaintiff, S. D. Hoaglin, from Pineville, N. C., to his brother, the other plaintiff, who was at Granite Quarry, N. C. The two cases were consolidated by consent of the parties, and tried together, as they involved substantially the same questions of fact and law. The jury returned the following verdict:

1. Was the defendant guilty of negligent delay in the transmission and delivery of the message sued on, as alleged in the complaint?

(392) Answer: Yes.

2. If the telegram had been delivered promptly, could and would T. L. Hoaglin have attended the funeral of plaintiffs' mother, alleged in the complaint? Answer: Yes.

3. What damages, if any, is the plaintiff T. L. Hoaglin entitled to recover of the defendant for mental anguish caused by said negligent delay in the transmission and delivery of the said message? Answer: Five hundred dollars.

4. What damages, if any, is the plaintiff S. D. Hoaglin entitled to recover of the defendant for mental anguish caused by said negligent delay in the transmission and delivery of the said message? Answer: Two hundred and fifty dollars.

Judgment was entered thereon, and defendant appealed.

The evidence tended to show these facts: Plaintiff S. D. Hoaglin, whose mother had died about 12 o'clock m. on Saturday, 3 June, 1911, sent the following message at 5:15 p. m. to his brother, T. L. Hoaglin:

T. L. HOAGLIN,
Granite Quarry, N. C.
Mother died today. Bury tomorrow at 10 o'clock. Come.
S. D. HOAGLIN.

The message was filed with the defendant at Pineville, N. C., which is 10 miles south of Charlotte, N. C., on 3 June, 1911, at 5:15 p. m.; it was received at Charlotte, at 5:30 p. m. the same day, the operator in the Charlotte office stating that it was on his hook when he returned to his instrument at 5:30 o'clock. There was but one continuous wire from Charlotte to Granite Quarry. He called the office at the latter place over this wire, and found it was "open," which means that he could not use it, as it was "out of commission," or broken at some place; where, he could not tell. It continued to be "out of order" until the next morning. Trains left Granite Quarry at 8:30 and 10 o'clock p. m. and at 1:30 and 6 o'clock a. m. T. L. Hoaglin stated that he could have walked to Salisbury and taken a train there, and would have done so, had he received the message in time to have reached Pineville before the
funeral, the distance from Granite Quarry to Salisbury being only (393)
5 miles. The message was sent to R. E. Mitchell, a train dispatcher
at Salisbury, over the wires, for the purpose of having it sent by the conductor of the train at 9:50 a. m., which was Sunday. It was delivered by the conductor to T. L. Hoaglin at Granite Quarry at 10:30 the same morning, but too late for him to attend the funeral, which was then being held. When W. H. Crum, the lineman, who was at or near Thomasville during the afternoon of Saturday, 3 June, 1911, returned to Salisbury, about dusk, on No. 35, he was told by Mitchell of the break

in the wire to Granite Quarry, but as it was dark he did not go to the place of the break that night, although he had a railroad velocipede, but waited until next morning, when he went on his velocipede in search of the break in the wire, and found it about 4½ miles from Salisbury and in sight of Granite Quarry, that is, about one half mile from that place. A heavy electrical and wind storm had passed over that section about 4 o'clock p. m. on Saturday, 3 June, and it had blown a tree down, which fell across the wire. Crum pulled the wire from under the tree and spliced and replaced it on the pole. This was about 10 o'clock Sunday morning. There was another lineman at Salisbury, but it does not appear why he was not called upon to repair the broken wire. There was a telephone line connecting Pineville with Granite Quarry, and it appeared that neither the Charlotte nor the Salisbury operator notified the sender, by a service message, that his telegram could not be delivered. S. D. Hoaglin testified that he could have used the telephone had he been notified by the defendant of the failure to deliver his message.

The defendant requested the court to give the following instructions, which were modified, as will appear, and defendant excepted to the modification:

1. If the jury find from the evidence and by the greater weight thereof that on the 3d day of June, 1911, at about 4:25 o'clock p. m., the wire of the defendant between Salisbury and Granite Quarry was broken or disconnected by a tree falling across it on account of a wind or electric storm, and that the said interruption continued until after 10 o'clock of the morning of 4 June, 1911, and that the only wire reaching from
(394) Charlotte to Granite Quarry available to the use of the defendant was the said wire, which was broken or interfered with by the said electric storm, and that the said interference or breaking of the said wire by the said storm was the cause of the defendant not delivering the message referred to in the complaint in this action, then the jury are instructed to answer the first issue "No."

The court refused to give the foregoing instruction, as prayed by the defendant, but added to the same the following: "Provided you find that the defendant could not, by the exercise of reasonable care and due diligence, have transmitted and delivered the message to T. L. Hoaglin, notwithstanding the storm."

2. If the jury find from the greater weight of the evidence that a tree fell across and broke the defendant's wires about 4:25 p. m. on 3 June, by reason of a storm, and that the defendant, with due diligence, removed the tree and reconnected the wires, and that the defendant's delay in delivering the message was caused by said tree being blown on the wires by a storm, the jury are instructed to answer the first issue "No."

The court refused to give the foregoing prayer, but added thereto the following: "Provided you find that the defendant could not, by the exercise of reasonable care and due diligence, have transmitted and delivered the message to T. L. Hoaglin, notwithstanding said storm breaking its said line."

The court, among other instructions, charged the jury as follows: "If you find from the evidence in this case that the defendant could not, on account of its wire between Salisbury and Granite Quarry being down, deliver the message to the sendee, T. L. Hoaglin, then it was the duty of the defendants, the telegraph company, to use reasonable diligence to notify the sender, S. D. Hoaglin, and if it failed to do so, then the defendant was negligent, and you will answer the first issue 'Yes.'"

Defendant excepted to this instruction, and now assigns it as error.

Stewart & McRae for plaintiff.
Tillett & Guthrie for defendant.

WALKER, J., after stating the case: There was error in the (395) last instruction given by the court, but not in telling the jury that, when the defendant discovered it could not send the message over its wire from Charlotte, it was its duty to notify the sender at Pineville of the fact, for that is correct. *Hendricks v. Telegraph Co.*, 126 N. C., 304; *Cogdell v. Telegraph Co.*, 135 N. C., 431; *Hood v. Telegraph Co.*, 135 N. C., 622. The defendant's failure to notify the sender of its inability to deliver the message was evidence of negligence. *Hood v. Telegraph Co., supra; Hendricks v. Telegraph Co., supra; Cogdell v. Telegraph Co.*, 135 N. C., 431; *Woods v. Telegraph Co.*, 148 N. C., 1. It having been shown that the message had not been delivered, a *prima facie* case of negligence was made out, as was decided in the cases we have just cited. The Court said in *Hendricks v. Telegraph Co., supra:* "It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure." This very language was repeated in *Cogdell v. Telegraph Co., supra.* See, also, *Laudie v. Telegraph Co.*, 126 N. C., 431; *Hunter v. Telegraph Co.*, 130 N. C., 602; *Rosser v. Telegraph Co.*, 130 N. C., 251. This was not controverted, as we understand, by the defendant, and it undertook to explain its apparent gross neglect of duty. Whether it succeeded in doing so was for the jury, and so far as the duty resting upon it to repair the break in its wire from Charlotte to Granite Quarry is concerned, the charge of the judge was more than favorable to it, not so much in respect

of what he did say on that branch of the case as in respect of what he did not say. It appears, from R. E. Mitchell's testimony, that there was a violent storm at 4 o'clock in the afternoon of Saturday, 3 June, 1911, and that the wire to Granite Quarry went down at 4:25 o'clock, so that at least sixteen hours elapsed after the break in the wire before there was any attempt made to mend it. The witness W. H. Crum, who was a lineman, did not return to Salisbury until dusk, but why he was not earlier called in to make the needed repairs and why he did not use his velocipede that night with a lantern, the trains having stopped (396) running for the night, does not clearly appear. Nor does it appear why the other lineman at Salisbury was not called upon to do the work. It seems to have been a very simple operation, and the break in the line was easily discoverable, according to Crum, as the tree was lying on the wire very near the track, and could not easily have escaped the attention of a lineman on the car with a light, even in the nighttime, and especially of a man who was keeping a watchful lookout for it. Why the defendant failed to send a service message, notifying the sender of the accident to its line, is not explained. The fact that S. D. Hoaglin lived 2 miles from Pineville, if he did, was no excuse for not sending the message to the office at Pineville, so that if the sendee was there, he could be notified. The operator at Charlotte knew that the wire was open as early 5:35 o'clock, Saturday afternoon, just twenty, or at the most, thirty minutes after it had been filed at Pineville. It does not follow that S. D. Hoaglin was not in Pineville at that time, simply because he lived 2 miles from the town. 37 Cyc., 1678. It was said in *Rosser v. Telegraph Co.,* 130 N. C., 255: "The message having been shown by the testimony, and also admitted in the answer, to have been received by defendant and the charges prepaid, it then became its duty to deliver it to the addressee at the point to which it was addressed. If, however, that could not be done, then it was incumbent upon defendant to show that it had performed its part of the contract by exercising due diligence in endeavoring to do so. The fact that plaintiff lived several miles from West End does not excuse the defendant from making prompt and diligent inquiry to see if he were not within its delivery limits at that point when the message arrived." It is natural to suppose that Hoaglin may have been in Pineville, awaiting an answer from his brother, as, with due care on the part of the defendant, it required a very short time for such a reply to reach him. We do not think, though, that defendant was required to deliver the service message to him beyond the corporate limits of Pineville, or beyond its free delivery limits there, if it has any. *R. R. v. Stroud,* 82 Ark., 117; *Telegraph Co. v. Davis,* 71 S. W., 313; *Telegraph Co. v. Matthews,* 113

Ky., 188; *McCaul v. Telegraph Co.*, 114 Tenn., 661. It did not know when it received the message for transmission and delivery (397) to T. L. Hoaglin that its line was not in condition for use, and it could not well have anticipated the storm or what its effect would be on the efficiency of its service. It was in no default up to the time that H. J. Hale, its operator at Charlotte, returned to the office and tested the wires and found the one to Granite Quarry open. It is a little surprising, without explanation, that the chief night operator of a large office like the one in Charlotte, who is supposed to be careful, and who, at least, should be, failed at the opportune moment to notify the sender of the situation he had discovered. There is no satisfactory explanation of his conduct in this record. But while the fact that the message was not transmitted and delivered is *prima facie* evidence of negligence, the presumption thus raised may be rebutted by evidence showing that the company exercised due care or was prevented from making delivery by causes over which it had no control. 37 Cyc., 1673; *Fowler v. Telegraph Co.*, 80 Me., 381. It does not insure prompt transmission, and could not justly be required to do so, and is liable only for negligence. It follows that it is not responsible for delays due to unavoidable interruptions in the working of its lines, such as those resulting from storms or atmospheric disturbances, or any other causes over which it has no control and against which, in the exercise of ordinary prudence and foresight, it was not reasonably practicable to guard. It must, though, by the exercise of due care, provide against all preventable causes. If its wires are injured by a storm, it must make diligent effort to remove the obstruction and restore them to their normal condition, so that they can perform their usual functions. Whether the company did what the law required of it was properly left to the jury upon the facts, and under the rule of the ordinarily prudent man, though the charge did not deal with the details of the evidence as it should have done. The failure to notify the sender that it could not deliver the message was also evidence of negligence, but it was error to instruct the jury it was not only negligence, but if it was found that the service message was not sent, they should answer the first issue "Yes," because that issue involved not only negligence, but proximate cause, as it was submitted. The issue (398) was not so framed as to present literally the question of proximate cause, but it was so treated by the court, as judgment was given upon the verdict, and there is no other issue as to this act of negligence and its proximate results. The instruction simply misled the jury. Again, the court should have required the jury to find whether the service message could have been delivered to the sender at Pineville, and, if so, whether he not only could, but would, have used the telephone for the purpose

of sending the message to his brother in time for him to attend the funeral. Mere negligence is not actionable, and it does not become so unless it proximately causes damage. The precise question was decided in *Hauser v. Telegraph Co.*, 150 N. C., at p. 558: "The burden of proof was not upon the defendant to show that the plaintiff had not exercised diligence, but upon the plaintiff to show, not only that the defendant had been guilty of negligence, but that its negligence was the proximate cause of the damage to him. *Hocutt v. Telegraph Co.*, 147 N. C., 186. It is not enough to show that there has been negligence in order to entitle a plaintiff to recover; he must, in addition, show that the defendant's negligence was the proximate cause of his injury. Negligence is not actionable unless it is the proximate cause of the damage. *Brewster v. Elizabeth City*, 137 N. C., 392. The burden is always upon the plaintiff to prove every requisite of his cause of action. This is not a question of contributory negligence which would shift the burden of proof to the defendant, but it is one of the essential elements of the cause of action that the negligence of the defendant should proximately cause the damage." The second issue evidently referred to the original message and its prompt transmission over the defendant's wires and its delivery to T. L. Hoaglin at Granite Quarry, and not to the service message. The error of the court in thus instructing the jury requires us to order a new trial, as we are unable to determine whether the answer to the first issue was given under the charge as to the duty of defendant to repair its wire with reasonable care and diligence or under the erroneous instruction. If we could separate the two because we knew with certainty that the jury were not influenced by the

(399) error, we would do so, but it is impossible, as the correct and incorrect instructions have together passed into the verdict, which is indivisible. In such a case, a new trial is the only remedy for the error. *Rowe v. Lumber Co.*, 133 N. C., 433, and cases cited; *Dunn v. Currie*, 141 N. C., 126. It is analogous to the principle decided in *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 662; *Edwards v. R. R.*, 132 N. C., 99; *S. v. Barrett*, 132 N. C., 1005, and more recently in *Patterson v. Nichols*, 157 N. C., at p. 413. The issues should be amended so as to embrace the questions arising upon the second act of negligence imputed to the defendant, one of which will be, whether the failure to notify the sender of the true situation was the proximate cause of the damage to the plaintiffs, and this, in its turn, will involve the question whether a service message could have been delivered within the free delivery limits, if any, at Pineville, and if none, then within the limits of the town, that being the place from which the original message was sent; and the further question, whether S. G. Hoaglin

would have used the telephone, if he had received the service message in time to do so, and he could thus have communicated with his brother at Granite Quarry in time for the latter to have attended the funeral. It will be better to present the questions as to the two acts of negligence in separate issues, for the jury may find that defendant did not mend its wire with due diligence, and that, if it had done so, the message would have reached T. L. Hoaglin in time for him to have gone to Pineville and attended the funeral.

There was evidence to support a finding for plaintiff on all these questions, but the facts must be found by the jury, and, at the next trial, the defendant may explain away its apparent default and fully acquit itself of the charge of negligence, and plaintiffs may strengthen some links in their case which will present it with greater clearness and conclusiveness to the jury and so as to satisfy them that the defendant's apparent negligence is very real and has been the legal cause of damage to them.

New trial.

Cited: *Ellison v. Tel. Co.*, 163 N. C., 11, 13; *Alexander v. Statesville*, 165 N. C., 532; *Betts v. Tel. Co.*, 167 N. C., 80; *Medlin v. Tel. Co.*, 169 N. C., 505, 506; *Champion v. Daniel*, 170 N. C., 3; *Howard v. Telegraph Co., ib.*, 499; *Johnson v. Tel. Co.*, 171 N. C., 132.

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(400)

LUCILE COOPER v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 5 March, 1913.)

1. Carriers of Passengers—Tickets—Stipulations Limiting Liability—Intrastate Tickets—Void Stipulations.

Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are held in this State to be void as an attempt on the part of the carrier to contract against its own negligence; and such stipulations are not enforcible on intrastate tickets or bills of lading.

2. Same—Interstate Tickets—Decisions of the United States Supreme Court.

The decisions of the Supreme Court of the United States are controlling as to the validity of stipulations on tickets of common carriers limiting their liability for baggege, and similar provisions on their bills of lading or receipts for the transportation of freight or express, only where the tickets and bills of lading are interstate.

APPEAL by defendant from *Daniels, J.*, at September Term, 1912, of VANCE.

This action is to recover damages for the loss of a diamond, which the defendant admits was a part of the baggage of the plaintiff.

Plaintiff introduced testimony tending to show that she resided in Texas, and being on a visit at Henderson, N. C., she went with another or others from Henderson to Morehead City; that her trunk was packed and delivered, locked and in good condition, to the S. A. L. Railway, and checked by it through to Morehead late in the afternoon of 6 July, 1911; that her kinsman purchased a return ticket for her, which she signed when brought to her at a german about 9 P. M., 6 July; that her trunk contained her wearing apparel, a silver jewel case in which were a diamond star pendant and a belt buckle, which she was carrying for her own personal use, the diamond having been given to her by her father and cost $450, and owing to subsequent advances in diamonds was now worth $500; that she left Henderson about 2 A. M., the
(401) 7th, and went on the first train leaving after purchase of her ticket, via S. A. L. to Raleigh, Southern to Goldsboro, and N. and S. to Morehead, arriving there about 11 A. M. the 7th; that she gave her check to porter of Norfolk Southern Railroad just before arriving at Morehead, at his request, and the trunk was delivered to her room in the Atlantic Hotel, owned by defendant Norfolk and Southern Railroad, promptly after her arrival there, and when so delivered its lock was broken and hanging down. Upon examination she found the jewel case had been broken open and the breastpin and belt buckle gone, and that she at once made complaint to the authorities of the hotel and of all three of the railroads and demanded pay for her loss.

The stipulation in the ticket relied on to limit liability of the defendant is as follows:

"5th. Baggage liability is limited to wearing apparel not to exceed one hundred dollars ($100) in value for a whole ticket, and fifty dollars ($50) for a half ticket, unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage."

The following verdict was returned by the jury:

"Was the property of the plaintiff lost through the negligence of the Norfolk and Southern Railway Company? Answer: Yes.

"What amount of damages, if any, is plaintiff entitled to recover? Answer: $450."

Judgment was rendered thereon in favor of the plaintiff, and the defendant excepted and appealed.

A. C. & J. P. Zollicoffer for plaintiff.

W. B. Rodman and T. T. Hicks for defendant.

ALLEN, J. The question presented by the appeal is as to the validity of the stipulation in the ticket limiting liability, and as the jury has found that the damage sustained was the result of negligence, and the transaction is intrastate, it is controlled by *Mule Co. v. R. R.*, 160 N. C., 215.

The cases of *Express Co. v. Corninger, R. R. v. Latta,* and *R. R. v. Miller,* relied on by the defendant, in which opinions were (402) filed by the Supreme Court of the United States on 6 January, 1913, decide that a stipulation in a bill of lading, similar to the one before us, is valid and limits the recovery, and these decisions would be controlling with us if this was an interstate shipment, made upon a bill of lading, but as it is not, we follow them only in so far as they commend themselves to our judgment.

The leading opinion was filed in the *Corninger case,* and *Mr. Justice Lurton* quotes with approval from *Solon's case*, 169 U. S., 133, discussing the effect of State legislation: "They are not, in themselves, regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits"; and from *Hughes v. R. R.*, 191 U. S.: "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may be this extent indirectly affect interstate commerce contracts of carriage?"

In the *Hughes case* a judgment of the Supreme Court of Pennsylvania was affirmed which permitted the recovery of all damages caused by negligence, notwithstanding a clause in a bill of lading limiting the liability.

It is conceded in the opinion that these two cases establish two propositions:

(1) That until Congress has legislated upon the particular subject, the State may regulate the relative rights and duties of all persons and corporations within its limits and may enforce its own policy, although connected with an interstate shipment. (403)

(2) That up to the time of the decision in the *Hughes case*

there was no sanction in the legislation by Congress of agreements limiting liability to stipulated valuations.

The court assumes that these two cases are decisive of the question that the States may enforce their policy as declared by statute or general law, and may award full damages for loss, the result of negligence, notwithstanding a stipulation limiting liability, unless the rule has been changed by act of Congress enacted subsequent to the decisions, and concludes that the Carmack amendment of 1906 has this effect.

The Carmack amendment is as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability thereby imposed: *Provided*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

If the Supreme Court of the United States had not held otherwise, we would conclude that this amendment could not, by any rule of construction, have the effect of giving validity to a contract limiting liability for negligence, although contained in a bll of lading.

It purports to deal only with the carrier receiving the goods
(404) —the initial carrier—and the common-law right of action against the connecting carrier is preserved by the proviso, "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

And as to the initial carrier, the statute says in express terms that it "shall be liable" for "any loss, damage, or injury to such property," and that "no contract, receipt, rule or regulation shall exempt such common carrier from the liability hereby imposed."

"Any loss, damage, or injury" means all loss, damage, or injury, and the statute says the holder is entitled to recover this, notwithstanding a stipulation to the contrary in the bill of lading, and we do not see

how such language can be construed to put life into a stipulation limiting liability and give it the effect of preventing a full recovery.

We are of opinion there is

No error.

Note: The "Cummings" Act, 3 March, 1915, changes the U. S. Rulings above referred to.

G. W. JEFFERSON & BROS. v. C. C. BRYANT.

(Filed 5 March, 1913.)

1. Liens—Material Men—Interpretation of Statutes—Substantial Compliance—Turnkey Job—Time of Completion.

While a substantial compliance with Revisal, sec. 2026, is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated.

2. Liens—Turnkey Job—Time of Completion—Statement as to Interest.

In this action to enforce a lien upon a building contracted to have been built for a certain total sum, the conclusion in the bill of particulars with reference to the commencement of the running of interest does not refer to the time of the completion of the building, as the plaintiff testified that it was completed at a different time.

3. Liens—Defective Claim—Contractors—Turnkey Job—Time of Completion—Amendments—Power of Courts.

Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and his claim for lien is defective, as filed with the clerk, in not stating the time the house was completed, as required by the statute, Revisal, sec. 2026, it cannot be cured by amendment allowed in the Superior Court at the trial.

APPEAL by defendant from *Cline, J.,* at September Term, 1912, (405)
of PITT.

In the summer of 1909 the plaintiffs contracted with the defendant, Cherry Bryant, to furnish the material for and to build a house for her upon a lot owned by the said defendant, Cherry Bryant, in the town of Fountain, for the sum of $250 for a turnkey job. The plaintiffs built said house according to contract, furnishing the material and all labor necessary, completing the house during April or May, 1910.

On 15 December, 1909, plaintiffs received from the defendant, Cherry Bryant, the sum of $50, and on 24 March, 1910, $50, leaving a balance due of $150, which remains unpaid. On 28 February, 1911, the plaintiffs purported to file a lien in the office of the Clerk of the Superior Court of Pitt County against the defendant on the said house and lot in Fountain to the amount of $150, and on 18 July, 1911, secured judgment on said lien against the defendant in the sum of $150 in a justice of the peace court, and the defendant appealed to the Superior Court.

The notice of lien and the account filed therewith are as follows:

G. W. JEFFERSON & BROS., Claimant,

v.

CHERRY BRYANT, formerly CHERRY BELL, Owner or Proprietor.

The said G. W. Jefferson & Bros., claimant, file their lien against the said Cherry Bryant, formerly Cherry Bell, owner or proprietor, in the office of D. C. Moore, clerk of the Superior Court in and for said county.

Said lien is for material and labor on the house of the said Cherry Bryant, formerly Cherry Bell, as per bill of particulars herewith filed.

The said house being situate in the county of Pitt, in Foun-
(406) tain, adjoining the lands of R. B. Owens, G. W. Jefferson & Bros., and others, on Railroad Street, and being the identical house built by said G. W. Jefferson & Bros. for said Cherry Bryant in the town of Fountain. The said G. W. Jefferson & Bros, claim their lien.

This the 28 day of February, 1911.

G. W. JEFFERSON & BROS., *Claimant.*

BILL OF PARTICULARS.

CHERRY BRYANT, *alias* CHERRY BELL, *Owner and Proprietor,*

To G. W. JEFFERSON & BROS., Claimant, *Dr.*

Date, February 28, 1911.

To balance due on account for material and labor due for building one house in Fountain, the total amount of account being $250, upon which she has paid $100, leaving a balance of $150, with interest from 1 January, 1911.

G. W. JEFFERSON & BROS., *Claimant.*

The defendant contended before the justice and in the Superior Court that the lien was invalid because no time was stated therein when the labor was done or the material furnished, or when the house was completed, and excepted to adverse rulings on these contentions.

In the Superior Court the court permitted the plaintiffs to amend the lien as follows: "It was completed in April or May, 1910." To this defendant excepted.

There was verdict and judgment in favor of the plaintiffs, and the defendant excepted and appealed.

F. G. James & Son for plaintiffs.
W. F. Evans for defendant.

ALLEN, J. This action is to enforce a lien under section 2026 of the Revisal, which requires that "all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof," and it has been uniformly held, in construing this statute, that there must be a substantial compliance with its terms, and that the statement of time is material. *Wray v. Harris,* 77 N. C., 77; *Cook v. Cobb,* 101 N. C., 68. (407)

The headnote to the *Cook case,* which is fully sustained by the opinion, is that, "It is essential to the validity of a laborer's lien that the 'claim' or notice which he is required to file shall set forth in detail the times when the labor was performed, its character, the amount due therefor, and upon what property it was employed; and if it is for materials furnished, the same particularity is required. Defects in these respects will not be cured by alleging the necessary facts in the pleadings in an action brought to enforce the lien."

This rule has been very generally modified when the contract is to complete a building for one sum, and in such case it is not required that the labor performed and the materials furnished shall be itemized, but that the time of the completion of the work shall be stated. The cases are collected in the notes to 27 Cyc., 188.

If we apply these principles to the notice of lien in the record, it is fatally defective, as no time is given in connection with any item, and the time when the contract was completed is not stated. The conclusion of the bill of particulars, "with interest from 1 January, 1911," does not refer to the completion of the contract, as the plaintiff testified it was completed in April or May.

The plaintiff contends, however, that this defect was cured by amendment in the Superior Court, and this presents the question of the power of the court to make the amendment. The Superior Court has broad and ample jurisdiction over the amendment of process and pleadings, but the notice of lien is neither a process nor a pleading, and it was only in the court for the purpose of enforcement. If against real estate, the statute requires it to be filed before the clerk, and states what is necessary to make it valid. If defective when filed, it is no lien, and

to permit an amendment, curing a fatal defect, would be to confer upon the court the power to make a lien, and thus destroy the provisions of the statute.

The question has not been directly presented in this State, but
(408) the controlling principle has been declared. In *Phillips v. Higdon*, 44 N. C., 382, *Pearson, J.*, said: "Where the amendment will evade or defeat the operation of a statute, the court has no power to allow it. This is clear; for no court has the power of nullifying a statute. By way of illustration, the statute requires that a levy should describe land in a particular way, for the purpose of informing the defendant in the execution, and all who may wish to become purchasers, what land the sheriff is to sell. If a levy is not sufficient, and a sale under it is made good by an amendment of the levy, the effect is to defeat the operation and purposes of the statute, and to allow land to be sold without the safeguards which the Legislature has provided against surprise and fraud. It might happen that a defendant in an execution, who from the levy, 'land lying on Craney Fork,' was under the impression that some out tract of his was to be sold, might, after the sale, find himself deprived of his 'home place' under the power of the court to allow the constable to amend his levy by adding the words, 'being the tract of land lying on the forks of the said creek, on which the defendant now resides," and this was affirmed in *Cogdell v. Exum*, 69 N. C., 464, and in *Patterson v. Wadsworth*, 94 N. C., 540.

This principle has been applied in other jurisdictions to the amendment of a lien. *Vreeland v. Boyle*, 37 N. J. L., 346; *Flume Co. v. Kendall*, 120 Cal., 182; *Lindley v. Cross*, 31 Ind., 110; *Goss v. Stelitz*, 54 Cal., 640; Jones on Liens, vol. 2, sec. 428; Phillips Mech. Liens, sec. 428.

In the New Jersey case the Court says: "It is obvious that the lien claim is not a file in the Circuit Court, nor in any court. It is a record in the office of the clerk of the county, like the registry of a deed or mortgage. It is the foundation of the action, but no part of the suit. The record in the Circuit Court begins with the issue of the summons and continues with the filing of the declaration, pleas, etc. The court may amend its own files and records under the authority given in sections 129 and 166 of the practice act, but it has not power to alter or amend the records in the county clerk's office, either by these sections or anything contained in the mechanics' lien law. Only preceedings in
(409) actions in courts can be altered by joining an omitted plaintiff, or striking out one improperly joined, where it shall appear that injustice will not be done by such amendment, and the person affected by the amendment consents. If it were conceded that the court might

amend the summons, declaration, and pleas in this case, under the extensive power given in section 166 of the practice act, for the purpose of determining in the existing suit the real question in controversy between the parties, yet it cannot, without some express authority, go beyond its own jurisdiction, into the county clerk's office, and there alter the records so as to make them conform to the changed papers in court."

Being, therefore, of opinion that the lien is defective and that the court did not have the power to amend the same, a new trial is ordered.

New trial.

Cited: Lumber Co., v. Trading Co., 163 N. C., 317.

CHARLES M. PFEIFER & CO. v. J. P. ISRAEL.

(Filed 12 March, 1913.)

1. Intoxicating Liquors—Principal and Agent—Notes—Purchase Price—Actions in Pari Delicto.

A note given in this State for the purchase price of intoxicating liquors to a nonresident dealer, where the sale is made in North Carolina in violation of our prohibition laws, cannot be enforced in our courts, the parties being *in pari delicto.*

2. Same—Place—Place of Contract—Criminal Liability.

Where the agent of a nonresident dealer in intoxicants solicits in North Carolina and effects a sale thereof here, where the purchaser executes his note for the purchase price, it is held that the contract of sale was made in North Carolina, prohibited by our laws, and not enforcible in our courts. *Semble,* the agent is subject to indictment.

ALLEN, J., concurring; WALKER and BROWN, JJ., dissenting.

APPEAL by plaintiff from *Justice, J.,* at Special Term, 1912, of HENDERSON.

Michael Schenck and Murray Allen for plaintiff.
H. G. Ewart for defendant.

CLARK, C. J. This was an action begun before a justice of (410) the peace upon two notes for less than $200 each and on appeal consolidated by consent into one action. The notes were executed by the defendant to the plaintiff for whiskey bought from the plaintiff's agent. The order for the whiskey was given in Hendersonville, N. C., to the salesman of the plaintiff company, and the whiskey was shipped

by the latter from Cincinnati, Ohio, to Hendersonville, N. C., and delivered to defendant at the latter place, and the notes were executed there.

This was the entire evidence. The issue was, "Is the defendant indebted to the plaintiff, and if so, in what sum?" His Honor instructed the jury that if they believed the evidence to answer the issue "No." The jury responded accordingly. The defendant excepted to the instruction and to the judgment, and appealed.

The point before us was expressly decided in *Vinegar Co. v. Hawn,* 149 N. C., 355, upon an identical state of facts. The Court held that "the contract being made in Hickory, to deliver there, was illegal, and the courts of this State will not lend their aid to collect an account based on such contract. If the liquor was shipped in from another State, that was simply the method the plaintiff took to secure it for his purposes. The delivery to defendant was agreed to be made in Hickory, and was so made. The plaintiff cannot violate the law by an illegal contract and then ask the courts to help it to enforce such contract. When, as here, the parties are *in pari delicto,* the courts will help neither. If the money has been paid, it cannot be recovered unless the statute so provides (as in regard to usury, Revisal, 1951), and if not paid, the courts will not aid in the collection. It will leave the parties to their own devices," citing *King v. Winants,* 71 N. C., 469; *Griffin v. Hasty,* 94 N. C., 438; *Basket v. Moss,* 115 N. C., 448; *McNeill v. R. R.,* 135 N. C., 733; *Oscanyan v. Arms Co.,* 103 U. S., 261 (which holds that it is not even necessary to plead the invalidity, it being sufficient if it appear on the evidence); *Ewell v. Daggs,* 108 U. S., 146. The Court further cited with approval the following from *Kelly v. Courter,* 1 Okla.,
(411) 277: "The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." To the same purport, *Walker, J., Edgerton v. Edgerton,* 153 N. C., 167.

Not only is the contract for the sale of liquor invalid, but the agent was indictable for soliciting the sale. Laws 1908, chap. 118, now Pell's Revisal, 3527a.

It was in regard to such a statute as this that the United States Supreme Court held in *Delamater v. South Dakota,* 205 U. S., 93, that a State "may forbid the carrying on within its borders the business of soliciting orders for liquor, although such orders may only contemplate a contract resulting from final acceptance in another State." In that case *Mr. Justice White* said, referring by name to *Robbins v. Shelby Taxing District,* 120 U. S., 498; *Caldwell v. North Carolina,* 187 N. C., 682; *R. R. v. Sims,* 191 U. S., 441, that the Court put out of view those

cases, "because they concerned the power of a State to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law. The general power of the States to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question."

The Court further said: "The business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped."

It is recognized, therefore, by both the State and Federal courts that the contract by which this liquor was ordered was an illegal contract, and that the fact that it was to be shipped here from Ohio did not make the contract valid. It follows that the courts will not enforce the payment of a note given in execution of an illegal contract. The proposition is so fully discussed by *Judge Field* in *Oscanyan v. Arms Co.*, 103 U. S., 261, and cases there cited that further debate is unnecessary.

Where a person in this State, at the request of another, agreed to buy cotton futures for him in New York, a contract also made (412) illegal by our statutes, it was held that the person sending the order to New York for the purchase of the futures could not recover his losses. *Garseed v. Sternberger*, 135 N. C., 501. There the whole transaction was in New York, but the contract to do the act was made in North Carolina. This has been cited and reaffirmed in *Burns v. Tomlinson*, 147 N. C., 647, which held a subsequent promise to pay invalid. The Court said, "Certainly the courts could not aid the plaintiff to a recovery when our statute makes it a misdemeanor to aid directly or indirectly in making such contracts," citing also to the same effect, with approval, *S. v. Clayton*, 138 N. C., 732. In the latter case the Court held that it is "comptent for the Legislature to provide that gambling contracts participated in by the defendant in this State, either originating or being ratified here, shall be indictable in our courts, and such contracts are not protected by the interstate commerce clause of the Federal Constitution." *S. v. Clayton* was also cited as authority in *Rankin v. Mitchem*, 141 N. C., 284.

Where a note was given in consideration of a bet on a horse race in another State, it is not enforcible here. *Gooch v. Faucett*, 122 N. C., 270. Here the notes were given in this State upon an illegal contract also made in this State.

No error.

ALLEN, J., concurring: It does not appear from the record that the order given by the defendant for the whiskey was forwarded to the plaintiff at Cincinnati and accepted there.

On the contrary, the uncontradicted evidence is that the salesman of the plaintiff went to Hendersonville and there accepted the unconditional order for the whiskey, which was shipped subsequently from Cincinnati on the order, and the notes sued on were executed in Hendersonville.

The term "salesman" implies that the agent of the plaintiff had authority to make a contract of sale, and the subquenent delivery was but in performance of the contract.

If so, the action is to recover on a contract for the sale of (413) intoxicating liquors made in this State, which cannot be enforced.

Page on Contracts, sec. 2592, says: "If the contract is made through an agent, and the principal is in another jurisdiction, the question where the contract is made depends upon the authority of the agent and the manner in which he attempts to bind his principal. If he has authority to bind his principal, and he does so as a finality, the place where he enters into the contract is the place where the contract is made."

In *Backman v. Mussey,* 31 Vt., 550, the contract for sale of intoxicating liquors was made in Vermont and the liquors were shipped by a New York dealer from New York, and the Court says as to this item: "The contract for the first bill of liquors charged in the plaintiff's account was so far made in this State, though consummated by a delivery without the State, as to be invalid here."

Also in *Starace v. Rossi,* 69 Vt., 304, the order was taken in Vermont by an agent of the plaintiffs and sent to the plaintiff at New York and accepted there, and the Court said: "But it is claimed that the contract for this liquor was made in New York, and that, therefore, recovery can be had. The answer to this is, that the contract was in part, at least, made in this State, and that prevents recovery as effectually as though it had been wholly made here." The courts of Iowa sustain the same principle. *Yegler v. Shipman,* 33 Iowa, 200; *Taylor v. Pickett,* 52 Iowa, 468.

The case of *Westheimer v. Weisman,* 60 Kan., 753, is not in conflict with these views, because under the facts presented, no contract was made in Kansas, it being expressly stated that the order taken by the agent was subject "to approval of the plaintiffs at their place of business in Missouri," as the Court says upon the point: "The agent did not more than make an offer of sale, subject to the approval of his house. The final acceptance of the order and the consummation of the sale occurred in Missouri, where such sales were lawful."

WALKER, J., dissenting: This action was brought to recover the amount of two notes, one for $143.65, dated 17 June, 1910, and the other for $150, dated 5 December, 1910, both made at Hendersonville, N. C., the first payable generally and the second at Hen- (414) dersonville, N. C. The evidence was to the effect that they were given for whiskey, brought by the defendant upon orders for the same sent through an agent of the plaintiffs, then at Hendersonville, N. C., to the plaintiffs at Cincinnati, Ohio, and accepted by them there. The liquor was shipped from Cincinnati to Hendersonville and there delivered to the defendant, who pleaded the illegal consideration, namely, the sale of the liquor in this State. The court submitted the following issue to the jury, "Is the defendant indebted to the plaintiff, and if so, in what sum?" and upon the evidence instructed the jury, if they believe it, to answer the issue "No," which was done, and from the judgment upon the verdict the plaintiff appealed.

The opinion of the Court is based upon the erroneous assumption that the sale of the liquor was made in this State, whereas, even according to our own decisions, it was made in the State of Ohio, where the sale of liquor is not prohibited. There is no evidence that it is, and the fact is that it is not.

We have frequently held that where there is a purchase of goods and the seller delivers them to a carrier for transportation and delivery to the purchaser at another place, the sale is completed upon the delivery to the carrier by the seller, the carrier, in such a case, being the agent of the purchaser to receive and accept the goods. This was clearly decided in *Gwynn v. R. R.*, 85 N. C., 429, and *Hunter v. Randolph*, 128 N. C., 91, and is an elementary principle in the law of sales. "As soon as an order for goods is accepted by the seller, the contract of sale is complete without further notice to the vendee, and the contract is fully performed on the part of the seller by the delivery of the goods to the proper carrier." This was said by the Court in *Ober v. Smith*, 78 N. C., 315, and approved in *R. R. v. Barnes*, 104 N. C., 25. The rule is so inflexible that in *Crook v. Cowan*, 64 N. C., 743, a very harsh application of it was made by the Court, and the defendant was required to pay for carpets he had ordered, without notice of acceptance of his order, upon the ground that delivery to the carrier, an express company, was delivery to him and a sufficient acceptance of his proposal to buy. But apart from our own decisions, which are conclusive upon the (415) question involved in this appeal, the Supreme Court of the United States, whose decisions in respect to it are binding upon us, has decisively settled the matter and foreclosed it that it would seem that further discussion should be unnecessary. This transaction is a "National sub-

ject," and not subject to local regulation or local views of public policy or to diverse legislation and rulings in the States, which, if permitted, would be at once destructive of the paramount right of control and regulation by Congress as conferred by the commerce clause of the Federal Constitution. In *Leisy v. Harden,* 135 U. S., 100, the Court said: "That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation by Congress, prohibit their importation from abroad or from a sister State? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become a part of the common mass of property within a State as to be subject to its unimpeded control?" And it thus answers the question: "To extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power 'any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing.' . . . It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be." The Court denies the proposition that a
(416) State can, by its laws, either directly or indirectly, prohibit the importation of liquor into its borders and its delivery to a purchaser there, nor the sale of it in the original package, except to the extent that Congress, in the legitimate exercise of its constitutional powers, has authorized it to do so. Congress has, by the act of 8 August, 1890, known as the Wilson Act, permitted the States to forbid the sale of imported liquor after its delivery to the consignee, but not before such delivery takes effect. But "it cannot pass the line of power delegated to Congress under the Constitution," nor that which Congress itself has marked as the extreme limit of State action. The Wilson Act distinctly referred only to sales of liquor in the original packages and did not permit the operation of State laws upon interstate shipments in liquor before that point in the commerce had been reached. Federal Penal Code, sec. 239, does not apply, because this is not a c. o. d. transac-

tion. The plaintiff relied solely upon the credit of the defendant, and did not even take a bill of lading to his own order, and draw on the defendant with the bill attached for the purchase money, as was done in *Spencer v. Fisher, ante,* 116. If the transaction considered in that case was interstate commerce, and under the protection of the commerce clause of the Federal Constitution, surely, and by a much stronger reason, the one presented in this case must be so, for the shipment to the defendant by the plaintiff was direct, upon an open bill of lading, and the defendant, so far as appears, ordered the liquor for his own consumption and not for resale. The order for the liquor and the acceptance thereof at Cincinnati, Ohio, the delivery of it by the seller to the carrier at the latter place and its transportation to Hendersonville, with the delivery of it there to Israel, the purchaser, was a continuous and lawful transaction, as Congress had passed no law permitting the State laws to operate upon the shipment before the delivery of the package to the defendant, if it had the power to do so. In this connection, what is said by the Supreme Court of the United States, the final interpreter of the law upon all Federal questions, becomes very pertinent, and it is well to recall and consider it, lest we pass the bounds circumscribing State action. After stating that the Court, in construing
the Wilson Act, had held that the law did not authorize State (417)
power to attach to liquor shipped from one State into another
before its arrival and delivery to the consignee within the State to which destined, the Court, in *Delamater v. South Dakota,* 205 U. S., 93-100 (51 L. Ed., 724), uses this significant language: "The rulings in the previous cases to the effect that, under the Wilson Act, State authority did not extend over liquor shipped from one State into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State." It was further said by the Court that the Wilson Act adopted a special rule, under which State authority as to liquor shipped from other States is allowed to operate after, but not before, the package of liquor has been delivered to the consignee, that is, that State authority begins only where interstate commerce ends. Many cases are cited by the Court in support of this view, and there are none to the contrary. *Re Rahrer (Wilkerson v. Rahrer),* 140 U. S., 545; *Rhodes v. Iowa,* 170 U. S., 412; *Vance v. W. A. Vandercook Co.,* 170 U. S., 438; *American Express Co. v. Iowa.,* 196 U. S., 133; *Pabst Brewing Co. v. Crenshaw,* 198 U. S., 17; *Foppiano v. Speed,* 199 U. S., 501; *Heyman v.*

R. R., 203 U. S., 270. In *Heyman v. R. R., supra* (referring to *Vance v. Vandercook Co., supra*), the language of the Court is clear and strong in commenting upon the legal effect of the Wilson Act and in setting the limits to State power under the act. "The interstate commerce clause of the Constitution," says the Court, "guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows State authority to attach to the original package before sale, but only after delivery. *Scott v. Donald,* 165 U. S., 58, 107 (41 L. Ed., (418) 632, 648), and *Rhodes v. Iowa, supra.* It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States, and that the inhibitions of a State statute do not operate to prevent liquors from other States from being shipped into such a State, on the order of a resident, for his use." And in subsequent cases the construction adopted in the previous cases of the word "arrival," as employed in the Wilson Act, has been reaffirmed and applied. The case of *Vance v. Vandercook Co., supra,* involving the validity of the dispensary law of South Carolina, had decided "that the State statute must permit the delivery of the liquors to the party to whom they were consigned within the State, but that, after such delivery, the State had power to prevent the sale of the liquors, even in the original package." The conclusion is inevitable, and we state it in the language of the Court itself, that "the Wilson Act merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce (only) upon completion of delivery, under the contract of interstate shipment, and before the sale in the original package." *American Express Co. v. Iowa,* 196 U. S., at p. 142. That authority is decisive of this one, as it expressly repudiates the principle which it is contended applies to this case, and in unmistakable words. Referring to the numerous decisions of that Court upon this question, it says: "Those cases rested upon the broad principle of freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the States where made." The Court further says that it will not stop to inquire when the title passes by delivery, or to reconcile conflicting decisions of the State courts in regard thereto, but places its decision upon the broad ground that when the liquor is ordered from a foreign

State and the order is accepted and the shipment made there, it is interstate commerce until arrival at its destination and delivery (419) to the buyer, and the State cannot interfere with the shipment until such delivery has been completed. Reviewing two decisions of that Court in cases where this Court had been reversed upon the very question now presented (*Caldwell v. North Carolina,* 187 N. C., 622; *R. R. v. Sims,* 191 U. S., 441), and applying them to shipments of liquor, the Court said: "Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from the rule which would otherwise declare the tax to be an interference with interstate commerce." Deciding the same question in *Rhodes v. Iowa,* 170 U. S., 412, and referring to *Bowman v. Railway,* 125 U. S., 465, the Court, in stating its conclusion, says: "It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of National power to prevent."

The proposition cannot be denied that all the cases upon this question of interstate commerce, from *Robbins v. Shelby Taxing District,* 120 U. S., 489, to the last decision upon the subject, are applicable to a shipment of liquor from one State to another, except in so far as the law may have been changed by the Wilson Act and Federal Penal Code, sec. 239 (as to c. o. d. shipments), which do not apply to the facts of this case, for they have been so applied, with the exceptions stated, by the highest Federal court. It therefore is important to heed (420) what the Court holds in *R. R. v. Sims, supra,* that while the property in things sold may not technically pass, under a consignment, until the price is paid, "and hence it may be said that the sale is not completed until then, yet, as matter of fact, the bargain is made and the contract of sale completed as such when the order is received in the foreign State and the goods are shipped in pursuance thereof." This

question cannot be settled finally by what we may say, as, in respect to it, this is not the court of last resort, and for that reason, if for no other, our views should be brought into harmony with the decisions of the Supreme Federal Court, which are authoritative and controlling in the matter. There is nothing to be gained by adding another reversal to those already sustained upon the identical subject. We are required by the Federal Constitution, as well as by our own, to submit to the supreme law, as declared by the highest Federal court.

If we refer to State decisions, a case exactly in point is *Westheimer v. Weisman,* 60 Kansas, 753, where a recovery was allowed upon a state of facts in all respects like those presented in this record. "A sale, the parties to which are of different States, is a transaction of interstate commerce, wherever the contract of sale may be made, when the goods are to be transported from one State to another, whether the sale is made before or after shipment. Negotiations and sale in such cases through selling agents or by agents to buy are also acts of interstate commerce." 7 Cyc., 415. "Where an order for liquors is taken by an agent and forwarded to his principal in another State, who fills the order and delivers the goods to a carrier for transportation to the purchaser, it is generally held that the place of the contract is the place where the order is filled." 23 Cyc., 337. "Where an order is given and and accepted in a certain place and the goods delivered to a carrier for shipment, the contract is governed by the law of the place of shipment, and it makes no difference that they are not to be paid for until they arrive in a State to which they are shipped, unless the title is not to pass until they are received and paid for." 9 Cyc., 682-683. In a note to the
(421) last extract, p. 683, this State is said to be one of those in which it is held that the sale is complete when the goods are delivered to the carrier, citing *R. R. v. Barnes,* 104 N. C., 25, in support of the statement. But we should carefully distinguish between decisions in which the question of title merely was involved and those where the question was one of interstate commerce, as in this case, though according to our own decisions, and even regardless of the question of interstate commerce, the title, under the facts of the case, passed to Israel when the liquor was delivered to the carrier at Cincinnati. The law is thus stated very accurately and concisely in 23 Cyc., 336 and 337: "A contract made in one State for the sale of liquors to be delivered in another State, such as would be valid at common law, and which is not shown to be invalid where made, will enable the seller to maintain an action for the price in the State where the delivery is made, notwithstanding that, if made in the latter State, the contract would have been void. . . . Where an order for liquors is taken by an agent and forwarded to his principal

in another State, who fills the order and delivers the goods to a carrier for transpotation to the purchaser, it is generally held that the place of the contract is the place where the order is so filled." Numerous cases are cited in the notes in support of the text. *Managhan v. Reid,* 40 Mich., 665; *Wagner v. Breed,* 29 Neb., 720 (this case also decides the interstate commerce question); *Hill v. Spear,* 50 N. H., 253 (9 Am. Rep., 205); *Schlesinger v. Straton,* 9 R. I., 578. In *Monaghan v. Reid, supra, Judge Marston* said: "The evidence in this case tended to show that the note sued upon was given for liquors; that an agent of the plaintiffs below called at the place of business of defendant and took the order, which was sent on to his principals in New York, by them approved and the liquors shipped. The court upon this theory of the case submitted the case to the jury in accordance with the rule laid down in *Kling v. Fries,* 33 Mich., 275."

In *Kling v. Fries,* just cited, it was held: "Where an agent takes in Michigan a verbal order for goods and transmits it to his principals in Ohio for approval, and the latter there approve it and consign the goods to a common carrier in Ohio, and the vendee accepts the goods in Michigan, paying the freight, the contract is an Ohio contract (422) and not a Michigan one; and though the goods be intoxicating liquors, the transaction is not within the Michigan statute. At the common law a contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, though the price has not been paid nor the thing sold delivered to the purchaser. Illegality will not be presumed; nor will it be presumed, as against the validity of a contract, and in the absence of proof, that the statutes of another State have provisions similar to those of Michigan, and in derogation of the common law. It will not be presumed, in the absence of evidence or finding, that parties making a sale in another State, where it was presumably valid, of liquors to be transported to Michigan, intended thereby to assist the purchaser in violating the Michigan statute."

It is needless to do more than refer to the questions whether if the liquor was to be sold by defendant in violation of the State law, and plaintiff knew it at the time of the sale, he could recover, as the courts differ upon this matter, and the point is not in this case; nor is it necessary to discuss those cases which hold that the price of liquor sold in violation of law, for example, without a license, can be recovered, as that is not one of the questions in this appeal. I may say generally, though, that it is too late to question the proposition that liquor laws cannot be enforced by a State when it would involve the "regulation" of interstate commerce.

The fact that the agent of the plaintiff violated the law, if he did so, in taking the order for the liquor at Hendersonville, cannot affect the question so as to deprive plaintiffs of their right to recover, as the contract of sale, accompanied by the transportation of the liquor from a foreign State, was interstate commerce, which did not fall under the operation of the State law, as will fully appear by reference to the cases decided by the Federal Supreme Court and already cited. The statute, in its operation, is confined solely to the act of soliciting and receiving orders, and cannot have a more extensive effect, so as to prevent the consummation of the contract of sale, which was lawful until
(423) the delivery of the goods, and being lawful, plaintiffs are clearly entitled to recover the price of the liquor represented by the notes in suit. Besides, the solicitation of the order for the liquor is immaterial and not necessary to be shown in order to recover. It was the proposal of the defendant to buy, and the acceptance of the offer by plaintiffs, that made the contract. *Vinegar Co. v. Hawn,* 149 N. C., 355, if sound law, when examined in the light of the cases decided by the Supreme Court of the United States and already cited, is easily distinguished, as it was found, as a fact, and so stated in the opinion, that the sale and delivery were in this State.

We have said that defendant bought the goods for his own consumption and not to resell, and this being so, it is not perceived how the judgment of the court below can be sustained, even under our own decisions, much less under those of the higher court, which are of paramount authority. *S. v. Fisher,* recently decided by this Court, is decisive of this case. We there held that the order for the goods by Carl Spencer, upon solicitation of Hatke's agent at New Bern, the acceptance of his order and the shipment of the liquor from Richmond by Hatke, although under a bill of lading to Hatke's order, was interstate commerce, and not subject to the operation of State laws, either the act prohibiting the sale of liquor or the one forbidding the solicitation of orders for liquor, though the agent may have been indictable for soliciting, and this decision was made after considering the cases in the Supreme Court of the United States upon the subject, which need not be further discussed here. If the contract of sale is valid, the plaintiff is clearly entitled to recover upon the notes.

But there are two cases which were decided upon facts identical with those in this appeal, and which held that where an order was given for liquor to be shipped from another State, and accepted there and the liquor shipped accordingly, the sale was completed in the foreign State, and besides, that, being interstate commerce, notwithstanding the Wilson Act, the contract of sale was not subject to the operation of our State Laws, and was, herefore, perfectly valid. In one of these cases, *S. v.*

Whisenant, 149 N. C., 517; *Justice Hoke* said: "There was no testimony offered that would justify or permit a finding that a sale of whiskey consummated in Knoxville, Tenn., was an illegal sale; (424) and if there had been, it would seem that, by reason of the commerce clause of the Federal Constitution, our State legislation on the subject could not affect the transaction, in respect to its criminality, until and after there had been a delivery within the State. *S. v. Trotman,* 142 N. C., 662. By fair intendment, and especially when taken in connection with the testimony on the subject, the verdict, as it was rendered by the jury could only mean that they acquitted the defendant of retailing either liquor or cider, except in so far as the order sent for Ramsey to the house in Knoxville made out a case of guilt. This sale at Knoxville, as we have just said, was not illegal, and there was no evidence touching such order to show that defendant acted otherwise than as the buyer's agent." The defendant in the *Trotman case* was indicted for selling patent medicine without a license, contrary to the statute. It appeared that certain persons in this State gave orders for the medicines on a drug company in another State, which were forwarded to, received, and accepted by the company in that State, and the goods shipped from that State to the defendant, the drug company's agent in this State; that each package was wrapped in a separate parcel with the name of the purchaser marked thereon and then packed in one crate and shipped to the defendant, who distributed same in the original form to the purchasers: *Held,* that the defendant was not guilty, as he was at the time engaged in interstate commerce. *Caldwell v. North Carolina,* 187 U. S., 622, is cited as authority in the *Trotman case.* If the contract was declared valid because it was completed in the foreign State, and especially because it was interstate commerce and State laws could not affect it or directly invalidate it, how can this be done indirectly by merely declaring as unlawful the solicitation of orders for liquor? This proposition is hardly arguable. The soliciting agent may be criminally liable, but this does not render the contract illegal or void, for *no* laws of the State can reach it, as the commerce clause of the Federal Constitution stays the hand of the State until the liquor has been delivered. To hold otherwise would be committing the regulation of the interstate commerce to the States. The *Delamater* (425) *case, supra,* holds that the agent who takes the order is indictable, the statute forbidding him to solicit orders for liquor being valid as to him, but the Court, by *Justice White,* distinctly holds that the contract of sale is valid, being protected by the commerce clause against hostile legislation of the State, and it could not consistently hold otherwise.

It is suggested, however, that it does not affirmatively appear that

the order for the whiskey was accepted at Cincinnati, Ohio. That is not my construction of the defendant's own testimony, but the court directed a verdict upon the testimony, and if there is any defect in the evidence, so much the worse for the defendant. The burden is not on the plaintiff, but on him, as he pleads the illegality, and he must plead and prove every fact necessary to show it. "In an action to recover the price of liquors sold, the declaration or complaint need not allege that the sale was authorized by law or by plaintiff's license, for if defendant relies on the illegality of the sale as a defense, he must allege and prove it, and this cannot be done under the general issue, but must be specially pleaded, and by a plea setting forth every fact essential to show that the sale was contrary to law." The presumption is that the contract was valid. Defendant testified, after admitting the execution of the notes, that he bought the liquor from the plaintiff; that it was shipped out from Cincinnati upon an order he gave for the same to plaintiff's agent at Hendersonville. To say the least, it was for the jury and not for the court to say, whether the shipment of the liquor at Cincinnati was an acceptance of the order. But in respect to the interstate feature of the contract of sale, the case is like *Robbins v. Taxing Dist. of Shelby,* 120 U. S., 489 (30 L. Ed., 694), in which it appeared that the "salesman" or "drummer" of a firm resident in another State had solicited a sale of goods without taking out a license imposed by the State, and it was held that the negotiation of the sale of the goods at Memphis, Tenn., with the intention of shipping them into the State where the negotiation was made, from Cincinnati, Ohio, was interstate commerce, and the State of Tennessee could not by legislation control or hamper it. The orders were made and the goods
(426) shipped the same way in both cases. The facts in *Caldwell v. North Carolina,* 187 U. S., 622 (47 L. Ed., 336), were even stronger in favor of the operation of the State license law, as the goods were shipped from Chicago, Ill., to Greensboro, N. C., "to order of the shipper," and his agent, at the latter place, put the pictures and frames together and there delivered them to the persons who had given him the orders: *Held,* nevertheless, to be a sale in Chicago; and the same was decided in *R. R. v. Sims,* 191 U. S., 441 (48 L. Ed., 254), where the goods were shipped c. o. d. from Chicago, Ill., to Durham, N. C.: *Held,* to be a sale at Chicago. Both cases were decided under the commerce clause of the Constitution, and the transactions held to be interstate commerce not subject to State laws, as the sales were not made in this State within the meaning of that clause of the Constitution. There is no difference, in law, between this case and those I have cited, as the Wilson Act, in regard to shipments of liquor, does not operate until

after delivery to the consignee, and there is no evidence that the liquor was bought rof the purpose of a resale. In *Rhodes v. Iowa,* 170 U. S., 412 (42 L. Ed., 1088), we find language singularly pertinent here: "The right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspects, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of State authority should not, without the clearest implication, be held to imply the purpose of subjecting to State laws a contract which, in its very object and nature, was not susceptible of such regulation, even if the constitutional right to do so existed, as to which no opinion is expressed." Speaking of the right of a nonresident dealer to ship liquor into a State, the Court said, in *Adams Exp. Co. v. Kentucky* (*Brewer, J.*): "Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. *License Cases,* 5 How., 504, 577; *Leisy v. Hardin,* 135 U. S., 100-110. In *Vance v. Vandercook Co.,* 170 U. S., 438, 444, *Mr. Justice White,* delivering the opinion of the Court said: 'Equally (427) well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.' That the transportation is not complete until delivery to the consignee is also settled. In *Rhodes v. Iowa,* 170 U. S., 412, 420, 426, it was held that the Wilson Act was not intended to and did not cause the power of the State to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee. . . . In case of conflict between the powers claimed by the State and those which belong exclusively to Congress, the former must yield, for the Constitution of the United States and the laws made in pursuance thereof are 'the supreme law of the land.'" "By a long line of decisions, beginning even prior to *Leisy v. Hardin,* 135 U. S., 100, it has been indisputably determined: (*a*) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce; (*b*) That it is not competent for any State to forbid the transportation of such articles from one State to another; (*c*) That until such transportation is concluded by delivery to the consignee, such commodities do not become

subject to State regulations, restraining their sale or disposition." This was said in the very recent case of *R. R. v. Cook Brewing Co.*, 223 U. S., 70 (L. Ed., 355). The State may indict and punish the solicitor or "drummer" who violates its statute forbidding the taking of orders for the sale of liquor to be shipped into the State, but this power does not extend so far as to include the right to declare the contract of sale of the liquor to be void, for the exercise of such power would be to cross the line dividing the Federal from the State jurisdiction. The cases cited from the State courts and relied on to sustain the contrary of this position did not involve the question of interstate commerce, which is essentially different from the one they discuss and decide. *Coats*
(428) *v. State,* 48 Tex. Cr. Ap., 553, 838; *Parker v. State, ib.,* 69, and numerous cases cited.

But there is another view of the matter which entitles the plaintiff to recover. The prohibition of our law is against the solicitation of orders for the sale of whiskey. It is not contended that the State could prohibit the sale itself by a nonresident dealer to the defendant. That I take to be conceded. The State, therefore, has not prohibited the contract, as it could not, and the contract itself being otherwise valid, the unlawful solicitation of the order did not vitiate it. As *Judge Holmes* said, when passing upon a similar question, in *Fox v. Rogers,* 171 Mass., 546: "The supposed illegal act entered neither into the promise nor into the consideration.' The contract is able to stand, in law, by itself, without any aid from the act of plaintiff's agent. The shipment of the liquor, its receipt and acceptance by the defendant, constituted a sufficient consideration for the notes, or the promise to pay for it, and the act of the agent is entirely collateral. A large number of cases sustain this view, and among them we cite the following: *Larned v. Andrews,* 106 Mass., 435; *Watrons v. Snonffer,* 32 Iowa, 58; *Bank v. Crocheron,* 5 Ala., 250; *Gregory v. Bailey,* 4 Harr. (Del.), 256. A recent case in this Court illustrates the doctrine: *Electrova Co. v. Insurance Co.,* 156 N. C., 232, citing *Cotton Press Co. v. Insurance Co.,* 151 U. S., 368, and numerous other authorities. There is another principle upon which the plaintiff's recovery can easily rest, that is, upon the ground that an *indebtitatus* was created by the receipt of the liquor, from which an *assumpsit* in law arises, which will sustain an action on the case, and this right of action was not tainted or affected by the illegal act of the agent, which was collateral to it, the view taken by *Chief Justice Marshall* in *Armstrong v. Toler,* 24 U. S., 257. The law does not consider the advantage or interest of either party to the contract, but acts only from considerations of the public good. *Harrell v. Blanton,* 1 Smith Leading Cases, 153.

It seems to me that *Ober v. Katzenstein,* 160 N. C., 439, is "on all-fours" with this case, or, at least, the principle there applied is controlling here. Plaintiff in that case, being a nonresident cor- (429) poration, sued to recover a balance due on a purchase of fertilizers. Defendant alleged as a defense that plaintiff had failed to comply with Revisal, sec. 1194. By that section a foreign corporation is forbidden to do business in this State without first filing its charter in the office of the Secretary of State and otherwise complying with the requirements of that section. Defendant alleged that plaintiff had not complied with the provisions of that section and consequently could not recover on the contract of sale. A demurrer to this defense was sustained, upon the ground that the prohibition of the statute as to doing business in this State did not affect the contract, but was collateral thereto and could be availed of only by the State in an action to recover the penalty, the law not having declared the contract invalid, the Court, by the *Chief Justice,* saying: "But the statute does not invalidate either the express contract made between the parties nor indeed the implied contract raised by the receipt of the goods of the plaintiff by the defendant," citing *Tobacco Co. v. Tobacco Co.,* 144 N. C., 358. The State law could not declare the contract in this case invalid, as it is an interstate transaction.

But there is still another view of the case. The order given by defendant to the traveling agent of the plaintiff at Hendersonville, for the liquor, did not designate any particular liquor, but, on the contrary, was for a quantity of liquor, not specifically identified or appropriated, which was to be taken from plaintiff's stock of liquors in Cincinnati, Ohio. The thing to be sold was not, therefore, identified, and the contract with respect to it was not complete until it was so taken from the mass in Cincinnati and delivered to the carrier for shipment. The contract continues to be entirely executory until the articles sold are segregated from the mass, or the thing purchased, in general terms, is taken from many of the same description in order to fill the order. This is the controlling rule and is well settled. 1 Benjamin on Sales (Bennett), 7 Am. Ed., sec. 352; Mechem on Sales, secs. 695 and 700. The same principle is fully recognized in the leading case of *Hatch v. Oil Co.,* 100 U. S., 124, where it is said: "Sales of goods not specified (or identified) stand upon a different footing, the general rule being (430) that no property in such goods passes until delivery, because until then the very goods sold are not ascertained." We have a case exactly similar in *Blakely v. Patrick,* 67 N. C., 40 (ten buggies case), which has been frequently approved. *Atkinson v. Graves,* 91 N. C., 99; *McDaniel v. Allen,* 99 N. C., 135; *Moore v. Brady,* 125 N. C., 35. In

Blakely v. Patrick, Pearson, C. J., said: "In order to vest the title or ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only."

Even in the view that the orders were taken and accepted at Hendersonville, N. C., *Reavick v. Pennsylvania*, 203 U. S., 507, would seem to be decisively against the defendant as to the question of interstate commerce. See, also, *Eager Co. v. Burke*, 74 Conn., 534, in which the Court also refused to hold the contract of sale invalid because the solicitor of the orders had violated the local statute and was indictable.

The judgment, in my opinion, should be reversed and a new trial awarded.

JUSTICE BROWN concurs in this dissenting opinion.

Cited: Smith v. Express Co., 166 N. C., 158; *S. v. Caldwell, ib.*, 312, 317; *Pfeifer v. Drug Co.*, 171 N. C., 215.

LYTTON MANUFACTURING COMPANY v. HOUSE MANUFACTURING COMPANY.

(Filed 26 February, 1913.)

1. Contracts, Written—Parol Evidence—Contradiction.

When the parties to a written contract have therein expressed their meaning in plain terms, it may not be contradicted or altered by parol testimony; but when the contract is partly in writing, the oral stipulations can be made available when they do not contradict the written part.

2. Same—Vendor and Vendee—Method of Payment.

When in a contract of sale it is stated that the purchase price is to be paid by the vendee in money, or so many dollars, without further written specification, parol evidence may be received tending to establish, as a part of the contract, a contemporaneous agreement that a different method of payment should be accepted.

3. Same—Terms of Payment.

Where in a written contract of sale it is stipulated that the vendee pay for the article sold a certain sum of money, "terms net cash thirty days after installation," the specified terms of payment have reference only to the time and amount of payment and the passing of the title, and do not and were not intended to specify or control the method of such payment. *Woodson v. Beck*, 151 N. C., 144, cited and distinguished.

4. Same—Agreement of Exchange—Consideration.

The defendant being sued for the purchase price of a certain machine, or trap, sold under a written contract specifying the price to be in a certain sum, "terms net cash thirty days after installation": *Held*, as a method of payment presented by the pleadings, it was competent for the defendant to show by parol that the trap was inadequate for the purpose intended, and that the parties agreed as a part of the contract that the trap should be paid for the vendor taking it backk, furnishing a sufficient and larger trap, for which the vendee was to make an additional payment and return the trap which had been furnished.

5. Pleadings — Forms — Prayers for Relief—Practice—Contracts—Breach of Warranty.

Under our practice, rights are declared and justice administered on the facts which are alleged and properly established, without reference to any particular form of statement in the pleading, or to the prayers for relief therein set out; and, in this case, it is *Held*, that the court erred in excluding the defendant's evidence tending to show his damage by way of counterclaim, in the breach of warranty of a contract of sale.

APPEAL from *Daniels, J.*, at November Term, 1912, of HALI- (431)
FAX.

Plaintiff complained of defendant and alleged that on 1 January, 1912, it sold and delivered to defendant a return trap No. 34, at the contract price of $250, under a written contract in terms as follows:

LYTTON MANUFACTURING CORPORATION, (432)

FRANKLIN, VA.

Order No. 26.

Ship to A. C. House Lumber Company, Weldon, N. C.

Date, January 3, 1912. Via S. A. L. Ry.

Terms: Net cash 30 days after installation.

Type of trap, Return. Quantity, 1. Series, 34. Inlet, 2. Outlet, 2½. Size of trap body, ...

Price, $250.

Remarks.: F. o. b., Franklin, Va.

All traps are guaranteed by Lytton Manufacturing Corporation to be free from defective material and workmanship and subject to thirty days trial before acceptance.

Signature of purchaser: A. C. House Lumber Company.

Signature of salesman: R. D. Whitehorne.

A return trap is an implement by which water is taken from a dry-kiln and put back in the boiler. No part of said price has been paid.

There was evidence offered by plaintiff tending to support the allegations, including the written contract as above set out.

Defendant answered, admitting the sale, delivery of the trap No. 34, at the price of $250, and that no part of the same had been paid, and admitted, further, the signing of the paper-writing, claimed by plaintiff to be the entire contract between the parties. By way of counterclaim and as a further defense, defendant answered further and alleged:

"And further answering the said complaint, by way of counterclaim, this defendant says that heretofore it purchased from the plaintiff for the uses of its business, during the fall of 1910, a trap, style No. 33, to take care of 35,000 feet of pipe in connection with its dry kilns, and that this trap was guaranteed to do this at the time of the sale and installation. It was ascertained thereafter that the trap was not large enough to take care of the water, and there was considerable waste water in the kilns, and in using this trap it was found that four kilns failed to dry as much lumber as three previously dried. That defendant there-
(433) upon took the matter up with the plaintiff, and was told to try the trap out thoroughly, and if it would not take care of the pipe the plaintiff would exchange the installed trap for one of larger size and allow the defendant to return the No. 33 trap, which was the one installed, and put in one of a larger size, a No. 34, and pay the difference, which is the sum of $50.

"That thereafter the installed trap, No. 33, was given a thorough trial up to the month of January, 1912, when this defendant found it useless to try to use it longer, as it was deficient and not according to its guaranty, and on 5 January, 1912, an order was given for the larger trap, No. 34, in accordance with the agreement to exchange, and at the time of the giving of the order this defendant, through its president, stated to the plaintiff's president and salesman that he gave the order in accordance with the agreement to exchange, with payment of the difference in price, and that he would not pay the purchase price of $250 for the new trap ordered, No. 34, and keep the old trap.

"That the trap referred to in said order was ordered with this understanding on the part of defendant, and was shipped with this knowledge on the part of the plaintiff.

"That this defendant has at all times been willing to return the old trap, and has offered to do so, and pay the sum of $50, which was the difference in price between the two traps."

There was evidence offered by defendant tending in one aspect to sustain the position that the old trap was to be taken back in part payment of the contract price of $250, and tending also to support a claim for damages by reason of a breach of a guarantee made in the sale of the former trap, No. 33. After hearing the statement of the witness, the court "excluded all evidence bearing on the counterclaim" as set up

in the answer, and charged the jury, if they believed the evidence, to render a verdict for plaintiff for contract price of $250. Verdict for plaintiff. Judgment, and defendant excepted and appealed.

W. E. Daniel for defendant.
No counsel contra.

HOKE, J. The decisions of this State are in full recognition of (434) the principle that when the entire contract between parties has been put in writing and expressed in terms plain of meaning, it may not be contradicted or altered by parol testimony (*Fertilizer Co. v. McLawhorn,* 158 N. C., 274; *Jeffords v. Waterworks,* 157 N. C., 10; *Bank v. Moore,* 138 N. C., 529), and they are also in affirmance of the position that when the contract is partly in writing, the oral stipulations can be made available when they do not contradict the part that is written, for, as said by the *Chief Justice* in *Walker v. Venters,* 148 N. C., at page 389, "The written word abides." The doctrine as it obtains here is very well stated in the first headnote to *Evans v. Freeman,* 142 N. C., 61, as follows: "The rule that when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it, applies only when the entire contract has been reduced to writing; and where a part has been written and the other part left in parol, it is competent to establish the latter by oral evidence, provided it does not conflict with what has been written." In that well-considered opinion and in a case in the next volume, *Typewriter Co. v. Hardwood Co.,* 143 N. C., 97, it was held, in effect, that when a note is given payable in money, or so many dollars, without further written specification, parol evidence may be received tending to establish, as a part of the contract, a contemporaneous agreement that a different method of payment should be accepted. In Brown on Parol Evidence, sec. 117, it is stated as a recognized proposition that "Parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond." The words appearing on the face of of the order, "Terms: Net cash thirty days after installation," in no wise affect the position, for these words, by correct interpretation, have reference only to the time and amount of payment and the passing of the title, and do not and were not intended to specify or control the method of such payment. *Meade v. McLoughlin,* 42 Mo., 198; *Foley and Woodside v. Mason,* 6 Maryland, 37; *Austin v. Welch,* 72 S. W., 881. In *Woodson v. Beck,* 151 N. C., 144, the application of the principle, as heretofore stated, was denied because the parol evidence offered tended to establish throughout a radical change in the contract, of

(435) which the note sued on was an admitted part, and in *Walker v. Venters, supra,* the same ruling was made because a specific method of payment was expressly stipulated for in the writing, to wit, "so many bales of cotton, weighing 500 pounds each," and cotton being high at the time, it was held that the offer to show a parol agreement that payment could be made in money of a less amount was of the substance and in direct contradiction of the written stipulation.

In the case before us, the written contract stated the price of trap to be net $250. The testimony offered by defendant, recognizing as it did the full measure of the obligation as contained in the paper-writing, tended, as it now stands and in one aspect of it, to show as part of the contract that there was an agreement that the trap presently sold should be paid for by taking back the trap previously bought and paying $50 additional. It tended only to show a different method of payment, and, under the authorities cited, we are of opinion that the same should have been received and considered on the issue as to the amount due. Again, while the testimony may not establish that plaintiff agreed to accept a different method of payment, this being indicated by a proposed question and answer to a witness of defendant, which were excluded, the facts set up by way of counterclaim, and the evidence offered in support of same, amounted to an averment that there had been a breach of guarantee in the sale of the former trap, causing damage to defendant, and in case the former position should be determined against defendant, he is entitled to have his aspect of his case presented under proper issues, and the amount of damage, if any, ascertained and declared by way of counterclaim, and, under our decisions, this right is not affected because no such relief is asked. As said in *Cheese Co. v. Pipkin,* 155 N. C., 401, "In numerous and repeated decisions of this Court, we have held that neither a particular form of statement nor a special prayer for relief should be allowed as determinative or controlling, but that rights are declared and justice administered on the facts which are alleged and properly established," citing *Williams v. R. R.,* 144 N. C., 498-505; *Bowers v. R. R.,* 107 N. C., 721, and other decisions; and *Brewer v. Wynne,* 154 N. C., 467, is a recent and (436) well-considered case in support of the position. There is error in the ruling by which the defendant's evidence was excluded, and this will be certified, that the cause may be tried before another jury.

Error.

Cited: Faust v. Rohr, 167 N. C., 361.

W. B. FLEMING v. TARBORO KNITTING MILLS.

(Filed 5 March, 1913.)

1. **Master and Servant—Assault Upon Servant by Superior—Scope of Employment — Damages — Respondeat Superior — Evidence, Conflicting — Questions for Jury.**

Where damages are sought of the master for personal injuries inflicted by the servant, and the evidence is conflicting as to whether the act complained of comes within the scope of the servant's employment or was done in the service of the employer, so that more than one inference may be drawn from it, the question of the master's ability is one for the determination of the jury.

2. **Master and Servant—Assault Upon Servant by Superior—Scope of Employment—Test—Respondeat Superior.**

Where damages are sought of the master for injuries inflicted on a servant by an assault of his foreman, the question is, not solely whether the superior servant was on duty at the time of the assault, but whether the act was done in the prosecution and furtherance of the master's business.

3. **Same—Evidence, Conflicting—Questions for Jury.**

Where it is shown that the master's foreman went to an employee whose duty it was to run a number of knitting machines, and, acting for the master, complained of the manner in which the machines were being run, and the evidence is conflicting as to whether the employee, unprovoked, assaulted the foreman in consequence of what he said, or whether the foreman, to enforce obedience, assaulted the employee without provocation, the question of the master's liability for an injury therein inflicted on his servant is one for the determination of the jury. In this case the charge of the court is approved.

APPEAL from *Cline, J.*, at September Term, 1912, of PITT.

Action for damages for personal injury. These issues were submitted.

1. Was the plaintiff unlawfully and wrongfully assaulted by the defendant John Mobley, as alleged in the complaint? An- (437) swer: Yes.

2. If so, was the defendant Mobley at the time acting within the scope of his employment as foreman of the knitting-room of the defendant, the Tarboro Knitting Mills? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer: Three thousand dollars.

The defendant knitting mills appealed.

Albion Dunn and Harry Skinner for plaintiff.

John L. Bridgers and G. M. T. Fountain & Son for defendant.

BROWN, J. There is abundant evidence that the defendant Mobley violently and wrongfully assaulted the plaintiff and to justify the finding of the jury on the first issue.

The only question presented by this appeal and discussed on the argument is the liability of the knitting mills for Mobley's act, and that was submitted to the jury under the second issue.

Where the facts are admitted, or there is no conflicting evidence, and only one inference can be drawn, it is for the court to determine whether the act of the servant comes within the scope of his employment or was done in the service of his employer.

But where the facts are not admitted, and the evidence is conflicting, as in this case, the determination of the question is properly left to the jury. *Daniels v. R. R.*, 117 N. C., 592; Wood on Master and Servant, 594; *Hussey v. R. R.*, 98 N. C., 34.

The test is, not whether Mobley was on duty at the time he assaulted plaintiff, but, Was the act done in the prosecution and furtherance of the defendant's business? *Roberts v. R. R.*, 143 N. C., 179; *Daniels v. R. R.*, 136 N. C., 527; *Dove v. Manufacturing Co.*, 157 N. C., 324.

The motion to nonsuit brings up for review the sufficiency of the evidence upon the second issue.

The record shows that the plaintiff had been in the employment of the defendant knitting mills since February, 1909, and his duties were to run eighteen knitting ribbing machines on the floor which (438) was in charge of the defendant John Mobley, foreman. Mobley, foreman, had the authority to hire and discharge hands, and the immediate direction of the operation of all the machines on said floor. It is admitted by Mobley that one Campbell, another employee, came to him and told him that plaintiff would not start up his machines; that he had broken off the needles.

Mobley testified: "After that, Mr. Clark came to me and told me he would not start the machines, and had left the machines and was throwing tops in the rack. I went to him and asked him why he didn't start it up. He said he was keeping it running. I said, 'It doesn't seem so; it has been shut down for about three-quarters of an hour.' He said, 'If you say so, you are a damn liar.' I expected him to hit me, and I struck him in the face. We were both standing by the tank. He struck at me, and I dodged, and I struck him again, and we clinched and fell on the floor, and he choked me on the floor."

There seems to be no difference in the evidence until Mobley accosted plaintiff about his work. As to what then occured the plaintiff testifies: "I stopped to count up my work to see how many dozen I had made. I went around to the bin and counted up my work. He came around. I

was looking over and counting. He said, 'What is the matter? Don't you want to run these machines?' I had eighteen machines to work. I said, 'I reckon so; I have run them.' He said, 'You haven't half run them.' I said, 'I have done the best I can.' He said, 'If you don't want to run them, I wouldn't do it.' I said, 'Just as you say; I will quit now; I have only two or three weeks more, and I will quit now.' He laughed and said he didn't want me to quit. I said, 'If you want to talk, just wait a few minutes.' At that time I stooped down to get another bundle of tops, and as I did he struck me with a monkey-wrench and hit me across the head, the back part, and struck me on the jaw. I threw up my head and it glanced. I had to save my head, and as I stepped back I lost myself and wrenched my ankle; then I caught myself from falling. I didn't know my leg was broke."

We think from Mobley's own evidence that he went to see plaintiff in consequence of what Clark had told him and to (439) remonstrate with plaintiff about his work and to compel plaintiff to start up the machines. In doing so he was acting for the defendant and in prosecution and furtherance of defendant's business. If while so doing he violently assaulted plaintiff with the monkey-wrench, as testified to by plaintiff, the defendant would be responsible for his act.

This question was properly presented to the jury under very clear and appropriate instructions as follows:

"The master is not responsible for wrongs done by the servant while not acting within the scope of his employment. If the servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant will be deemed to have been for the time suspended. The test is not whether it was done during the existence of the employment, *i. e.*, during the time covered by the employment, but whether it was done in the prosecution of the master's business. It is obviously a question of fact for the determination of a jury whether at the time of the particular act or omission by the servant which caused the injury the servant was acting within the scope of his employment or acting outside of it to effect some purpose of his own. The master is not responsible for wrongs committed by the servant while not acting about the master's business, or, what is substantially the same thing, while not acting within the scope of his employment. So the question is one for you to determine, whether at the time of the alleged assault the defendant Mobley was acting within the scope of his employment or authority, or was he in fact performing his master's business, or engaged in some pursuit of his own."

This instruction is in accord with our precedents. *Jackson v. Telegraph Co.*, 139 N. C., 353; *Hussey v. R. R.*, 98 N. C., 34; *Daniel v.*

R. R., 136 N. C., 523; *Dove v. Manufacturing Co.*, 157 N. C., 328; *Bucken v. R. R.*, 157 N. C., 446; *May v. Telegraph Co.*, 157 N. C., 416; *Roberts v. R. R.*, 143 N. C., 179.

This last case is reported in 8 L. R. A. (N. S.), 789. There is a (440) very instructive note by the editor, which bears directly upon this controversy, which we regard of such value as to justify quoting it at length. The editor says:

"There can be no doubt of the correctness of the decision in *Roberts v. R. R.*, on the facts of that case, since the assault took place after the occasion for correction or discipline had passed, and was clearly malicious and entirely disconnected from the master's business. But a more difficult question arises where the assault takes place at the very moment when the occasion for correction or discipline arises, and the servant inflicting it is, at the time, engaged in discharging the duties of his employment. No fixed rule as to this phase of the question can be formulated from the decisions, since they are in irreconcilable conflict. But, on principle, it would seem that if an assault is committed on an inferior servant by a superior while the latter is engaged in doing the very thing he is employed to do—that is, in supervising and directing the work—the master should be liable therefor. When an employer delegates to a servant authority to supervise the work and conduct of others, and to order and direct them in performing the work, it would seem that such servant, in issuing commands, and in attempting to enforce them, acts as the *alter ego* of the master, and that the latter must be held responsible for all acts of the supervising employee in compelling obedience to his orders for which the master would be responsible if they were done by himself."

The judgment of the Superior Court is

Affirmed.

(441)

S. T. CARSON v. THE NATIONAL LIFE INSURANCE COMPANY AND GEORGE BRILEY.

(Filed 5 March, 1913.)

1. Contracts—Assignments—Signing as Obligor—Intent—Interpretation.

One signing a unilateral written contract relating to personalty, at the place usual for obligors thereon, will as a general rule be bound by its terms, though his name does not appear in the body of the instrument, the test being whether from a perusal of the entire instrument, without the aid of extrinsic evidence, his intent to execute and to be bound by it plainly appears.

2. Same—Bilateral—Independent Stipulations.

The principle which obtains to bind one who has signed a written instrument as an obligor thereon, though his name may not appear in the body of the instrument, is, to a great extent, but not universally, confined to contracts relating to personalty which create a present obligation, and are, on their face, unilateral in operation, and not where the written instrument contains mutual or interdependent stipulations by reason of which, without the aid of extrinsic evidence, it cannot be determined whether a third person who joins in subscribing to the paper intended to come under obligation to one or the other of the subscribing parties.

3. Contracts—Interpretation—Assignments—Signing as Obligor — Realty — Married Women.

The general rule which binds one appearing upon a unilateral written instrument appearing to have signed it as an obligor thereon, does not obtain in instruments conveying or assigning rights and interests in realty, more particularly when rights of married women are claimed or assailed under deeds purporting to have been made by a husband in which his wife's name only appears with his as subscriber to the instrument.

4. Contracts—Partly Written—Assignments—Parol Evidence — Collateral—Burden of Proof—Degree of Proof—Preponderance of the Evidence.

In written assignments of ordinary mercantile or business contracts it is competent for the parties to prove by parol, and as a part of the agreement, but not reduced to writing, that the instrument should be held as collateral to secure a debt; and where a policy of life insurance has been assigned in writing it is only necessary to show, by the preponderance of the evidence, and not by clear, strong, and convincing testimony, that as a part of the agreement, resting in parol, the policy was not to be held as an absolute assignment, but only as collateral security for moneys advanced by the assignee thereon. In this case a statement appearing at the top of the written contract of assignment, describing it as "an absolute assignment, etc., does not affect the principles applied.

APPEAL from *Cline, J.*, at September Term, 1912, of PITT.

Civil action to recover on a life insurance policy. The policy, (442) in the sum of $1,000, was issued by the company on the life of one David A. Briley for the benefit of his son George. David having died, the suit was instituted by plaintiff, claiming to be the owner under an absolute assignment from both David A., the assured, and George, the beneficiary, evidenced by written contract in terms as follows:

ABSOLUTE ASSIGNMENT, WITH POWER OF ATTORNEY.

(*Duplicate.*)

In consideration of the sum of $1 and of other valuable considerations to me in hand paid, the receipt whereof is hereby acknowledged, I,

David A. Briley of Bethel Township, in the county of Pitt and State of North Carolina, issued 24th day of March, 1906, by the National Life Insurance Company of Montpelier, Vermont, for the sum of $1,000 and No. 180121, do hereby assign, transfer, and set over unto S. T. Carson of Bethel, N. C., in the county of Pitt and State of North Carolina, the said policy or contract of insurance, with all its benefits, subject to its conditions and to the rules and regulations of the said National Life Insurance Company, to have and to hold the same unto the said assignee, his executors or administrators forever.

And I do hereby authorize and empower the said S. T. Carson, his executors or administrators, to surrender said policy or contract of insurance at any time at or before its maturity, for its cash value, as the same may be determined by the said National Life Insurance Company at the time of said surrender, and to give to said company a valid and sufficient receipt therefor in the form required by said company, which receipt I hereby promise and agree shall be binding upon me, my heirs, executors, or administrators; and more fully to accomplish and effectuate the purpose of this assignment, I do hereby make,
(443) constitute, and appoint the said S. T. Carson, his administrators or executors, my attorney irrevocable, to take all proceedings in my name and stead, but to his use to ask, demand, levy, require, and receive of and from the said National Life Insurance Company, or others, all and singular, the sum and sums of money which shall and may be found due and payable, belonging and coming unto me by any means whatsoever for, by, or on account of the above named policy or contract of insurance, whether by death or by act of the insured, or maturity under its terms, without the payment to me of any further consideration.

And for the consideration above expressed, I hereby, for myself, my heirs, executors, or administartors, do covenant and guarantee to the aforesaid assignee, his executors or administrators, that the aforesaid policy or contract of insurance, No. 180121, belongs to me and is free and clear from all liens and encumbrances; that I have made no other transfer or assignment of nor power of attorney to collect upon the same which is now in force; that it is not affected by any proceedings in kankruptcy or insolvency instituted by or against me since its issue; that I have good right, full power, and lawful authority to assign the same in manner and form aforesaid; that I will at any time hereafter, at the cost of the said assignee, his executors or administrators, make, do, execute, or produce to be made, done or executed, such reasonable assurances, acts, and instruments for the more effectual confirmation of this assignment as may be requested by him or them, and that the

said assignee has, by the value paid by the said assignor, an insurable interest in the life insured, as represented by said policy or contract of insurance to an amount equal to its greatest value under any circumstances.

In witness whereof I have hereunto, and to duplicate hereof, set my hand and seal, this 9 October, 1907.

His
DAVID × A. BRILEY. [L. S.]
mark
His
GEORGE × BRILEY.
mark

STATE OF NORTH CAROLINA, COUNTY OF PITT—*ss.*

Be it known, that on 19 October, 1907, before me, a notary public in and for said county in the State aofresaid, duly com- (444) missioned and sworn, personally came and appeared David Briley and George Briley, of legal age, to me personally known, and known to me to be the same persons described in and who executed the foregoing instrument, and to me acknowledged the same to be their free act and deed.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office, the day and year last above written.

W. H. WOOLARD,
Notary Public.

My commission expires 26 October, 1907.

Suit having been instituted against the company, it paid the amount due on the policy into court, accompanied by the statement that it had been notified by George Briley, the son and beneficiary, that he was the owner, and suggesting that said George be made a party. This having been done, George Briley answered, denying that he had knowingly signed the contract, alleged that the signatures had been procured by fraud, and further, in effect, that the policy had been by him turned over to plaintiff and the written contract signed by him under a further agreement and understanding that the policy and its proceeds should be held by plaintiff as collateral for certain amounts which plaintiff had advanced and might be required to advance in keeping the policy alive by payment of premiums; and so demanded judgment that after allowing plaintiff for all sums advanced by him and 6 per cent interest, that the remainder of the money be paid to defendant.

The court charged the jury properly on the issues as to fraud in the execution of the contracts, and being of opinion that the instrument, if executed by George Briley, amounted to absolute assignment of the

policy, and the same being in writting, defendant could only claim an interest in the policy or its proceeds by establishing his alleged agreement by clear, strong, and convincing testimony, etc., the position being expressed in the charge as follows: "Therefore, where one alleges that a will or deed, or an assignment of an instrument absolute upon its face was in fact intended for a different purpose, then the person (445) alleging this condition or trust which he seeks to attach to the paper must satisfy the jury, by evidence that is clear, strong, cogent, and convincing, that the alleged agreement between the parties, which does not appear upon the face of the paper, was in fact a part of the agreement between them at the time, and that this intent should be included in the paper-writing." Defendant excepted. Verdict on the issues for plaintiff. Judgment, and defendant again excepted and appealed.

Julius Brown and S. J. Everett for plaintiff.
Harry Skinner and Albion Dunn for defendant.

HOKE, J., after stating the case: As a general rule, one who subscribes his name to a written contract at the place usual for obligors in such a paper is bound by its terms as a written agreement, though his name may not so appear in the body of the instrument (9 Cyc., 301), the test being, whether on perusal of the entire instrument and without the aid of extrinsic evidence it plainly appears that such signer intended to execute it and be bound by its terms. *Clark v. Rawson,* 2 N. Y., 135 (2 Denio); *Perkins v. Goodman,* 21 (Bar.) N. Y., 218; *Ex parte Fulton,* 7 Cowen (N. Y.), 484; *Thompson v. Coffiman,* 15 Oregon, 631; *Staples v. Wheeler,* 38 Me., 372; *Danker v. Atwood,* 119 Mass., 146; Amer. Digest (Cent. Ed.), Contracts, sec. 773.

By reason of the test suggested, the principle will to a great extent, but not universally, be confined in its application to contracts which create a present obligation and are on their face unilateral in operation, as in the case of a promissory note, and is not permissible where the written instrument contains mutual or dependent stipulations, so that without the aid of extrinsic evidence it cannot be determined whether a third person who joins in subscribing to the paper intended to come under obligation to one or the other of the contracting parties, an instance of this occurring in *Blackwell v. Davis,* 128 Mass., 538. It is also held with us, and by the weight of authority elsewhere, that the general rule does not obtain in instruments conveying or assigning rights and interests in realty, more particularly when the rights of married (446) women are claimed or assailed under deeds purporting to be made by the husband and in which the wife's name only appears with

him as subscriber to the instrument. In such case the decisions are that to bind the wife or convey or affect her interests there must be apt and operative words of assignment by her in the body of the deed. See *King v. Rhew,* 108 N. C., 696; *Harrison v. Simans,* 55 Ala., 516; *Bruce v. Wood,* 42 Mass., 542; *Lancaster v. Roberts,* 144 Ill., 213.

In the case before us, while the contract purports to assign an existent interest, in the absence of some contrary stipulation in the policy of insurance, the right to make such assignment rests with the beneficiary, George Briley (Bliss on Life Insurance (2 Ed.), sec. 337), and on a perusal of the entire instrument it plainly appears that it was his intent to transfer the policy to the assignee. He could have had no other reasonable purpose, and under the general principle first stated the judge correctly ruled that the paper writing was the written contract of said beneficiary and amounted in form to an absolute assignment of the same.

While we uphold his Honor's decision in the respect suggested, we are of opinion that he erred in charging the jury that the defendant was required to establish his position on the second issue "by clear and convincing evidence," such position being that the policy, though taken under an assignment absolute in form, was in fact held as collateral. This wholesome rule as to the degree of proof has been frequently held to apply in this State, and in proper case obtains both as to real and personal contracts (*Sallinger v. Perry,* 130 N. C., 134); but in the case before us, and others of like import, it only prevails where it is sought to alter or reform a written instrument or annex a trust thereto because it is necessary to do so in order to assert the right claimed or to avoid a material contradiction of a written contract or the portion of which the parties have reduced to writing. Thus, when it is alleged that a deed conveying realty, absolute in form, was intended as a mortgage, contracts concerning realty are required to be in writing, and in order to carry out the contract as claimed, it is necessary to reform a solemn written instrument, and the principle referred (447) to applies; and where, as in *Sallinger v. Perry, supra,* the position contended for involves a direct contradiction of the written contract, this too necessitates a change in the written instrument, and must be established by the same degree of proof. The recent cases of *Fertilizer Co. v. McLawhorn,* 158 N. C., 274; *Walker v. Venters,* 147 N. C., 388; *White v. Carroll,* 147 N. C., 330, are instances of this character; but in these assignments of ordinary mercantile or business contracts it is very generally held that it is competent for the parties to prove by parol that as a part of the agreement the instrument should be held as collateral to secure a debt. Such a position does not necessarily require or involve a change in the writing, but recognizing the contract as written

and as necessary to pass the title, it only superadds the additional stipulation indicated which the parties have made by parol. It presents a case where part of the contract only is in writing, and the additional feature having been made by parol and being valid when so made, can be shown and established by a preponderance of the proof. The principle was discussed in two cases at the present term, *Pierce v. Cobb, ante,* 300, and *Lytton v. Lumber Co.,* and is illustrated in several recent decisions of the Court. (*Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Evans v. Freeman,* 142 N. C., 61), and, as stated, is very generally applied in assignments of these ordinary mercantile contracts taken as collateral to secure indebtedness, including insurance policies, certificates of stock, etc. *Kendal v. Insurance Co.,* 171 Mass., 568; *Riley v. Bank,* 64 Mass., 482; *Westbury v. Summers,* 57 S. C., 467; *Chamberlain v. Butler,* 61 Neb., 730, reported 87 Am. St., 478, and principle referred to in editorial note at p. 511; *Brick v. Brick,* 98 U. S., 514.

We are not inadvertent to the statement in the record, at the top of the written contract, purporting to describe the same as "an absolute assignment and power of attorney." It was not shown that such a heading was or was not intended to be a constituent part of the contract, and for aught that appears it may be only an estimate of plaintiff as to its contents, and certainly on the facts presented it should not be allowed substantial effect in the interpretation. *Milhusen v. Eardman,*
(448) 103 N. C., 27; *Summers v. Hibbard,* 153 Ill., 102; 2 Page on Contracts, sec. 600.

For the error indicated defendant is entitled to a
New trial.

Cited: Richards v. Hodges, 164 N. C., 188; *Carson v. Ins. Co.,* 165 N. C., 136.

A. F. DUVAL v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 March, 1913.)

1. Railroads—Contruction of Road—Permanent Damages—Limitations of Actions.

The provisions of our statute, relating only to railroads, that no suit, etc., shall be brought against them for damages caused by the construction of their road, etc., unless the same "shall be commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property," contemplates that any and all damages arising by reason of construction of a railroad or repairs thereto is barred after five years.

2. Same—Subsequent Negligence—Increased Damages—Ponding Water—Questions for Jury.

Where a railroad company, in constructing its road, more than five years before the commencement of the action, has constructed an insufficient culvert to carry off the water, causing it to pond upon plaintiff's land to his damage, and there is further testimony that, within that period, the defendant had allowed the culvert to fill with mud and trash, stopping it up, and greatly increasing the damage to his land, the court upon the additional testimony cannot hold that the plaintiff's cause of action is barred.

3. Same—Interpretation of Statutes.

The five-year statute of limitations, applying to damages caused to lands by a railroad company in constructing its road, is inapplicable where the injury complained of is caused by its negligent failure to keep open a culvert it had there constructed, causing further damage to lands by the ponding of water thereon, for this additional damage is a wrong of a different character than that contemplated by the statute.

4. Railroads—Negligent Construction—Damages—Ponding Water—Subsequent Negligence.

Where a railroad company has built a culvert under its road to carry off the water, and thereafter has permitted this culvert to become stopped with mud and trash so as to cause further damage to plaintiff's land by the ponding of water thereon, the plaintiff's cause of action comes within the principles of a renewing trespass.

5. Same—Limitation of Actions.

Where the injury to lands caused by wrongfully ponding or diverting water on the lands of another is regarded as a renewing rather than a continuing trespass, the damages accruing within three years next before action brought can be recovered, though the injury may have taken its rise at a more remote period of time, unless sustained in a manner and for sufficient length of time to establish an easement.

APPEAL by defendant from *Foushee, J.*, at April Term, 1912, of JONES. (449)

Civil action to recover damages for wrongfully ponding water on plaintiff's land, by reason of a culvert and defects therein under defendant's roadbed. The jury rendered the following verdict:

1. Have the lands and crops of the plaintiffs been damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. If so, in what amount? Answer: $200.

3. Is the plaintiff's cause of action barred by the five-year statute of limitations? Answer: No.

Judgment on the verdict, and the defendant excepted and appealed, assigning for error, chiefly, that the court did not rule that, on the

entire testimony, if believed, plaintiff's cause of action was barred by the five-year statute of limitations.

D. L. Ward and J. K. Warren for plaintiff.
Rouse & Land for defendant.

HOKE, J., after stating the case: As a general rule, and in suits between parties other than railroads, the injury caused by wrongfully ponding or diverting water on the land of another, causing
(450) damage, is regarded as a renewing rather than a continuing trespass, and, unless sustained in a manner and for sufficient length of time to establish an easement, damages therefor, accruing within three years next before action brought, can be recovered, though the injury may have taken its rise at a more remote period. *Baldwin v. Roberts,* 155 N. C., 276, opinion by *Associate Justice Allen;* and same case 151 N. C., 407, opinion by *Chief Justice Clark; Spilman v. Navigation Co.,* 74 N. C., 675. This doctrine has been changed, in respect to railroads, by statute, Code, sec. 394, and, as more especially relevant to the facts presented, subdiv. 2 of said section provides as follows: "No suit, action, or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road, or the repairs thereto, unless such suit, action, or proceeding shall be commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property." From a perusal of this section it appears that any and all damages arising by reason of construction of a railroad or repairs thereto is barred after five years. Construing the section, the Court has several times held that for such an injury recovery must be for the entire wrong, and the cause of action accrues when the first substantial injury is caused by reason of any structure of the railroad of a permanent nature. *Campbell v. R. R.,* 159 N. C., 586; *Stack v. R. R.,* 139 N. C., 366. There was testimony on part of plaintiff that the roadbed was constructed in 1893 or '94; that the culvert complained of had never been sufficient to carry off the water and had always caused substantial damage to plaintiff's land by wrongfully ponding the water upon it. Under the authorities cited, therefore, if this were all the testimony relevant to the question presented, we would be constrained to hold that plaintiff's cause of action was barred; but there is further testimony in the record to the effect that in 1898 the defendant had allowed the culvert to fill with mud and trash, stopping it up, and since that time the damage to his land had greatly increased. Owing to this additional

testimony, the court could not hold that, on the entire evidence, if believed, plaintiff's cause of action is barred. The statute (451) refers to the construction of the road as designed by defendant's engineers and properly maintained, and, if defendant negligently fails to keep a culvert opened, which was built as a part of the road structure, and, by reason of such failure, a proprietor's land is damaged, this is a wrong of a different character, which withdraws the case from the operation of the statute, and, unless treated by the parties as a trespass causing permanent injury, as in *Ridley v. R. R.*, 118 N. C., 996, the plaintiff's cause of action would come within the principle first stated, that of a renewing trespass. *Hocutt v. R. R.*, 124 N. C., 214.

We find no reversible error in the record, and the judgment in plaintiff's favor must be affirmed.

No error.

Cited: Moser v. Burlington, 162 N. C., 145; *Rice v. R. R.*, 167 N. C., 3; *R. R. v. Armfield, ib.*, 464; *Clark v. R. R.*, 168 N. C., 416; *Perry v. R. R.*, 171 N. C., 40.

BLANEY HARPER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 March, 1913.)

Torts—Destruction of Property—Interest—Jury's Discretion.

Where a tort committed consists in the destruction of property, the jury may, in their discretion, award interest on the value of the property destroyed from the date of its destruction, in addition to the value of the property.

APPEAL by defendant from *Carter, J.*, at August Term, 1912, of DUPLIN.

These issues were submitted:

1. Did the defendant company wrongfully and negligently burn the property of the plaintiff, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is plaintiff entitled to recover? Answer: $450, with interest from 5 April, 1909.

The defendant appealed.

H. D. Williams for plaintiff.

Davis & Davis for defendant.

BROWN, J. The only error assigned is to the following charge: "You may, in your discretion, allow interest upon any damages (452) awarded to the plaintiff from the date of the fire or from any

intervening date, in your discretion. It is not recoverable as a matter of right, and rests in the sound discretion of the jury."

Damages recovered for a tort do not as a matter of law bear interest until after judgment, but when the tort consists solely in the destruction of property, and not in personal injuries, this Court has held that the jury may in their discretion give interest on the value of the property destroyed from the date of its destruction, in addition to the actual value of the property. *Rippey v. Miller,* 46 N. C., 480; *Guano Co. v. Magee,* 86 N. C., 351; *Williams v. Lumber Co.,* 118 N. C., 928; *Lane v. Butler,* 135 N. C., 419; *Stephenson v. Koonce,* 103 N. C., 266; *Wilson v. Troy,* 18 L. R. A., 499, and notes.

No error.

NEW HANOVER SHINGLE MILLS v. RICHARD SANDERSON ET AL.

(Filed 12 March, 1913.

1. Liens—Purchase Money—Deeds and Conveyances.

No lien for purchase money exists by operation of law in North Carolina in favor of the vendor; and where a grantor of standing timber only provides for the terms of deferred payment in his deed, without reserving the title, he has no lien on the timber conveyed.

2. Same—Pleadings—Demurrer—Fraud—Questions for Jury.

Where A alleges as his cause of action against B, that he has conveyed to him certain standing timber for which deferred payments were to be made, and it does not appear that he has reserved the title to secure these payments; that B has conveyed to C, who has his deed recorded; and that thereafter he and B have entered into a contract whereby the latter was to cut the timber in payment at a certain price based on the stumpage, and sues out an attachment on a part of the timber B has conveyed to C, a demurrer to the complaint is good; but where fraud is alleged in the transaction between B and C, that it was with the intent to cheat and defraud the plaintiff, an issue is properly raised for the determination of the jury.

3. Pleadings—Fraud—Defective Statement—Amendments.

Where a debtor whose property is sought to be attached has conveyed it to his codefendant, and there is an allegation in the complaint that it was with the intent to cheat and defraud him, and that the deed was fraudulently made, while not as explicit and full as it should be, is a defective statement of a good cause of action, and may be cured by amendment.

APPEAL from *Carter, J.,* at January Term, 1913, of PENDER.

(453) Demurrer to complaint. His Honor overruled the demurrer and required defendants to answer over. Defendants appealed.

Stevens, Beasley & Weeks, Bland & Bland, and Winborne & Winborne for plaintiff.

E. L. Larkins, J. D. Kerr, and E. K. Bryan for defendants.

BROWN, J. The facts are stated in the complaint, and appearing from Exhibits A and B attached to it, are as follows:

The plaintiff owned certain timber and conveyed it to the Cape Fear Lumber Company by deed dated 24 November, 1905, which is Exhibit B.

The Cape Fear Lumber Company conveyed a portion of said timber to Cottle & Lewis by deed dated 3 November, 1906, for an alleged consideration of $1,500. Cottle conveyed his interest to defendant Sanderson.

On 24 November, 1905, a contract was entered into between the New Hanover Shingle Mills and the Cape Fear Lumber Company providing, among other things, for the cutting and payment per thousand feet of said timber, which is Exhibit A.

Exhibit B, the deed from plaintiff to Cape Fear Lumber Company, was recorded first. The contract, Exhibit A, was recorded after the deed from Cape Fear Lumber Company to Cottle & Lewis was recorded.

The deed of plaintiffs conveyed the timber to the Cape Fear Lumber Company, and this deed, in stating how the timber is to be paid for, contains the following clause, which is about all there is relating to the payment for same:

"The party of the second part is to pay for said timber a certain price per thousand feet, the number of feet to be determined by (454) actual measurement or by appraisement. The manner of making the appraisement, the time within which the timber is to be cut and the price and manner of payment therefore is set forth in an agreement by the parties of the first part and the Cape Fear Lumber Company, and bearing even date herewith."

We are unable to find in Exhibit B any provision which reserves title to the timber or creates a lien upon it for the purchase money. Nor is there anything in Exhibit A which purports to give a mortgage or other enforcible lien upon the timber for the securing of the purchase money, certainly not as against a *bona fide* subsequent purchaser for value, whose deed was recorded before Exhibit A.

There is no purchase-money lien in this State, such as prevailed in England. This has been uniformly held since *Womble v. Battle*, 38 N. C., 182. *White v. Jones*, 92 N. C., 388; *Cameron v. Mason*, 42 N. C., 180; *Blevins v. Barker*, 75 N. C., 436; *Peck v. Culberson*, 104 N. C., 425.

If the complaint proceeded upon that theory alone and stated no other cause of action, we should unhesitatingly sustain the demurrer.

But the complaint avers that the Cape Fear Lumber Company is indebted to plaintiff in the sum of $1,075 for stumpage, which is the method provided by Exhibit A for the payment of the purchase money. It appears from the complaint that an attachment has been sued out against the property of the Cape Fear Lumber Company in this action, and the timber conveyed to Cottle & Lewis levied upon in the attachment proceedings, and plaintiff seeks to subject this timber to the payment of his debt, not because of a purchase-money lien, but by process of attachment duly levied.

As foundation for the attachment proceedings, the complaint alleges that the Cape Fear Lumber Company, with intent to cheat and defraud plaintiff, fraudulently undertook to convey by deed the said timber to Cottle & Lewis. The allegation of fraud is not as explicit and full as it should be, but it is rather a defective statement of a good cause of action, and may be amended. This averment raises an issue of fraud (455) which should be answered by defendants. The plaintiff should proceed to get service upon the Cape Fear Lumber Company, if possible.

The judgment overruling the demurrer and requiring the defendants to answer is

Affirmed.

E. M. BRYAN v. HILTON LUMBER COMPANY.

(Filed 12 March, 1913.)

Instructions—Contributory Negligence.

In an action for damages for a personal injury negligently inflicted by the defendant on the plaintiff while the latter was employed in operating a certain woodworking machine, there was conflicting evidence, on the issue of contributory negligence, as to whether the plaintiff put his hand in the machine while the rollers were revolving, wherein he failed to exercise reasonable care, or whether the resulting injury was caused by a defective machine. In other respects his Honor having properly followed the instruction held to be appropriate on the former appeal, his addition thereto in respect to the further evidence introduced was not error.

APPEAL from *O. H. Allen, J.*, at May Term, 1912, of NEW HANOVER.

The usual issues of negligence, contributory negligence, and damage were submitted.

There was a verdict on all issues for plaintiff. From the judgment rendered the defendant appealed.

George L. Peschau, J. D. Bellamy & Son for plaintiff.
E. K. Bryan and Davis & Davis for defendant.

BROWN, J. This case was before the Supreme Court at Spring Term, 1911, and is reported in vol. 154, page 485. A new trial was awarded defendant at that time because of the alleged failure to charge the jury on the phase of contributory negligence which defendant requested.

The facts are fully stated in the former opinion. It is unnecessary to restate them. The evidence contained in the record (456) of the last trial is substantially the same as on the former.

Eight of the assignments of error relate to the admission and rejection of evidence. An examination of them discloses that they are without merit and that a discussion of them would be of no value.

One of the counsel for plaintiff made some remarks in his address to the jury animadverting upon the testimony of a witness for defendant, Dr. Slocumb. It is useless to set out the remarks or to discuss this assignment. We are inclined to the opinion that they were within the bounds of legitimate criticism. Certainly they were not of sufficient importance to warrant us in ordering another trial.

His Honor gave the following instruction:

"If the jury find by the greater weight of the evidence that the plaintiff called to Alfred Robinson and had him to hold up the chip breaker with a board, and then shut off the feed gear, and, before the feed rollers stopped revolving, put his hand over the cogs in an attempt to break out the piece of wood, then he would be guilty of contributory negligence and could not recover. That is, the jury under those circumstances would answer the second issue 'Yes.'"

This is substantially the instruction prayed by defendant on the former trial, and which we held should have been given. His Honor gave it with this addition: "(That is, if he put his hand in there while the rollers were still revolving, and he knew it or could have known it, and failed to exercise reasonable care.) There is a contention there, the defendant contending he did that and the plaintiff contending it had stopped, and he put it in and it started off again, suddenly and unexpectedly." Defendant excepts to above charge in parentheses.

We do not think the addition to the instruction, which is excepted to, makes any material difference.

There was quite a conflict in the evidence offered by plaintiff and defendant as to whether the feed rollers had stopped when plaintiff put his hand in the machine in an attempt to break out the piece of wood.

The defendant contended that the plaintiff inserted his hand in the machine without waiting for it to stop. The plaintiff. (457)

contended that the machine had stopped when he inserted his hand, but that, owing to a serious defect, it started up suddenly and "ground up his arm like sausage meat."

We think the added words were not improper in view of the controversy in regard to the facts.

Taking the charge as a whole, it is full and clear and presented the contentions of plaintiff and defendant to the jury with fairness, and followed the well-settled decisions of this Court. We do not think the defendant has any just reason to complain of it.

We find no reversible error in the record.

No error.

FRANK HERBST v. TIDEWATER POWER COMPANY.

(Filed 19 March, 1913.)

Carriers of Passengers—Street Railways—Passenger's Opportunity to Procure Tickets—Ejection from Car—Damages.

While a carrier of passengers is liable in damages to a passenger for ejecting him from its cars for failure to have a ticket, when they have not afforded him a reasonable opportunity to procure one, the principle does not apply where a street car company, charging a 5-cent cash fare, sells six tickets for 25 cents, and the passenger, having had ample opportunity to buy them, goes to the seashore terminal, where, owing to the season of the year, tickets are not sold, of which he previously knew; and, returning, offers to buy tickets from the conductor at a place on the line where he knows the conductors did not sell them, and, refusing to pay the cash fare, is ejected from the car.

APPEAL by plaintiff from *Carter, J.*, at December Term, 1912, of NEW HANOVER.

This is an action to recover damages for the alleged unlawful ejection of the plaintiff from the defendant's car on its suburban electric railway line operating between Wilmington and Wrightsville Beach.

The following facts appear from the admissions in the plead-
(458) ings and from the evidence:

1. That defendant is a common carrier of passengers and freight, operating a railway between Wilmington and a station on Wrightsville Beach, called "Lumina."

2. That plaintiff had been a passenger on the downward trip and spent the afternoon at Lumina, and "toward evening, about supper time, 6 or 6:30 (27 August, 1911) he concluded to return, and got on the cars at Lumina, the terminal station of the company."

3. Defendant had a ticket office, and before entering the train, plaintiff went to the ticket office to buy tickets.

4. The ticket office was closed and he could not get the tickets.

5. Plaintiff got on the cars without objection.

6. The plaintiff, when called on for tickets, told the conductor that he "could not get them at the ticket office" at Lumina, and offered 25 cents to the conductor, asking him to get him the tickets on the other side of the trestle, at Wrightsville.

7. That the conductor demanded of the plaintiff the regular fare of 5 cents, which he refused to pay, insisting on his right to buy six tickets for 25 cents.

8. That at this time of the year the defendant did not maintain an office at Lumina, but had a ticket agent on its cars from near Bradley's Creek to Wrightsville, who sold six tickets for 25 cents.

9. That the plaintiff knew of these facts, and on the evening of the injury complained of, he got on the cars at Bradley's Creek, and passed through Wrightsville to Lumina.

The plaintiff testified: "I think there were ticket agents on all of these Beach cars. They went down as far as Wrightsville and got off at the frog. Those ticket agents sold tickets. The conductor did not sell any. I think the only kind of fare you could pay the conductor was a cash fare."

10. That plaintiff was ejected after he offered to buy tickets.

There was also evidence that when passengers had not had the opportunity to buy tickets, that the conductor going to Wilmington would pass them, and let them buy tickets at Wrightsville.

There was a judgment of nonsuit, and the plaintiff excepted and appealed. (459)

W. J. Bellamy and J. D. Bellamy & Son for plaintiff.

Davis & Davis, A. G. Ricaud, and K. O. Burgwyn for defendant.

ALLEN, J. We have no disposition to relax the rule announced in *Ammons v. R. R.*, 138 N. C., 555, and in *Harvey v. R. R.*, 153 N. C., 567, as to the duty of the carrier of passengers to afford reasonable opportunity to procure a ticket, but its application to the facts in evidence shows no breach of duty on the part of the defendant.

The plaintiff went from Bradley's Creek to the Beach, and it was on the return that he was ejected from the car, upon his refusal to pay the regular fare. He had been notified that at that season of the year no ticket office was kept open at Lumina, and he knew he could buy tickets from ticket agents on the cars from Bradley's Creek to Wrightsville, and that the conductor did not sell tickets and could only take a

cash fare. If, after being afforded an opportunity to buy tickets, he failed to do so, and was ejected for failure to pay the regular fare of 5 cents, because he wished to test his right to buy six tickets for 25 cents from the conductor, when he knew the conductor did not sell tickets, he had no one to blame except himself.

The judgment of nonsuit was properly entered.

Affirmed.

O. K. LAROQUE ET AL. v. W. L. KENNEDY ET AL.

(Filed 19 March, 1913.)

1. Appeal and Error—Former Decision of the Supreme Court—Review—Motion to Rehear—Practice.

A decision of the Supreme Court may not be reviewed in a subsequent appeal in the same action; the remedy is by petition to rehear.

2. Married Women—Judgments—Costs—Contracts.

The adjudication of costs against the losing party to an action is not contractual, but the creature of statute, and therefore bears no relation to the law regulating the liability of married women under their executory contracts.

3. Married Women—Judgments—Costs—Execution Against Lands.

Where a nonresident married woman has unsuccessfully prosecuted her action, and costs are taxed against her, execution may be issued on her lands situated here.

APPEAL by plaintiffs from *Carter, J.*, at November Term, 1912, (460) of LENOIR.

This action was commenced to recover damages for ponding water on the land of the *feme* plaintiff, and was tried at January Term, 1911, of LENOIR.

The verdict of the jury was against the plaintiff, and judgment was rendered thereon, adjudging, among other things, that the plaintiff pay the defendant's costs.

The defendant, at said term, moved the court that the judgment for costs be made a charge upon the separate estate of the plaintiff, and that a certain amount paid by him to the surveyor be taxed as costs. Both motions of the defendant were denied, and he excepted.

The plaintiff and the defendant appealed from the judgment, and this Court affirmed the judgment on the plaintiff's appeal, and reversed it

on the defendant's appeal, on the item as to amount paid the surveyor, and not otherwise. Judgment was then entered in the Superior Court, determining the amount to be taxed in the bill of costs for fees paid the surveyor, and adjudging that the plaintiff pay the costs.

The said plaintiff is a nonresident, and it appearing that she did not have sufficient personal property in this State to satisfy said judgment, execution was issued thereon, and her land was advertised for sale thereunder.

The plaintiff then applied for an order to restrain such sale, upon the ground of the invalidity of the judgment, she being a married woman, which was refused, and she appealed.

Loftin & Dawson, L. R. Varser, and G. V. Cowper for plaintiff.
Rouse & Land for defendant.

Allen, J. When this case was here upon the former appeal (156 N. C., 374) we said: "The defendant was not entitled to (461) have the judgment for costs made a charge against the separate estate of the *feme* plaintiff. The ordinary judgment for costs was rendered against her, which was proper."

If the plaintiff was not satisfied with this adjudication, her remedy was by petition to rehear, as she cannot present the same question for review upon a second appeal. *Roberts v. Baldwin,* 155 N. C., 279.

If, however, the question was *res integra,* we would not doubt the liability of the plaintiff.

She is a party and is suing to recover damages to her property under a statute which permits her to sue alone, without the joinder of her husband (*Graves v. Howard,* 159 N. C., 594), and costs are not contractual, but the creature of the statute. *Costin v. Baxter,* 29 N. C., 111; *Clerk's Office v. Commissioners,* 121 N. C., 29.

The capacity of a married woman to contract is not involved. She has used the court and its process to enforce a claim, and having failed in her action, the statute imposes upon her, as it does upon all parties in cases like this, liability for the incidential expenses.

The question has been decided in other jurisdictions, and upon the ground that, when by statute the married woman may sue alone, she must suffer the same penalty as other litigants. 5 Ency. Pl. and Pr., 156; *Hardin v. Holton,* 50 Ind., 324; *Hayes v. Insurance Co.,* 76 Va., 228; *Askew v. Renfroe,* 81 Ala., 361.

In the Indiana case the Court says: "It is objected that the judgment for costs against the plaintiff is erroneous, because she was a married woman. This objection we hold to be utterly untenable. A married woman may, under our statute, bring a suit in her own name for her

separate or individual property, but if she fails to establish her right to maintain her action, she must take the liability for costs of all other persons in such a case as this.'

Affirmed.

(462)

MARGARET S. ANDERSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 March, 1913.)

1. Carriers of Passengers—Regulations—Operation of Trains—Depot Buildings—Safe Ingress.

A railroad company may make reasonable regulations as to the running of its trains, and may determine the part of the train to be nearest the station at stops, having due regard for the convenience of the traveling public, and providing safe walkways from the place of egress to the station.

2. Carriers of Passengers—Feeble Passengers—Knowledge of Carrier—Depot Buildings—Negligence—Compensatory Damages.

Where a railroad company has been made aware of the feeble condition of a female passenger who had just left a sanatorium to take a long journey by rail to her home, and has been notified that the passenger should be taken good care of, and the train, nearly two hours late, reached its destination at 2:15 o'clock at night in inclement weather, and the employee on the train put the passenger off on the side of the train opposite the depot building, so that the passenger insisted she was at the wrong station, when the employee assisted her to disembark on the other side of the train, and left her exposed where there were no provisions made for passengers, 185 yards from the passenger shed, where her son, who had gone to meet her, afterwards found her weak, cold, and shivering, it is *Held*, some evidence of substantial damages to be submitted to the jury.

3. Negligence—Definition.

Negligence is the failure to exercise ordinary care, which depends upon the circumstances of the case, and is ordinarily a question for the jury.

4. Damages—Fright—Physical Injury—Instructions—Appeal and Error.

Mere fright is not considered in law as an element of damages; and where there is evidence tending to show that a railroad company negligently put a feeble passenger, at night, off its train on the opposite side from the depot, causing fright and sickness from the exposure, an instruction that the jury might award compensatory damages for fright, disconnected from any physical injury, is reversible error.

APPEAL by defendant from *Daniels, J.*, at November Term, 1912, of WILSON.

This is an action to recover damages caused, as alleged, by the negligence of the defendant. (463)

The plaintiff left the sanatorium of Dr. Starns, in Atlanta, Georgia, at 7:30 o'clock on the morning of 23 February, 1911, for her home in Wilson, North Carolina. She had been a patient in the sanatorium for seven weeks, and was feeble and delicate. She was accompanied to the train at Atlanta by a nurse, who told the conductor that the plaintiff was from the sanatorium and had been very sick. The defendant's track does not run into Atlanta, and the plaintiff did not become a passenger on the defendant's train until she reached Augusta, Georgia.

The plaintiff offered evidence tending to prove that the conductor from Atlanta put her on the defendant's train in Augusta and told the conductor on the defendant's train that the plaintiff had been very sick in the hospital and had a long trip to take and he wanted him to take good care of plaintiff; not to let her lift anything or be exposed; and the conductor on defendant's train said he would take care of her; that when the plaintiff left Atlanta the weather was pleasant; that when she arrived at Wilson about 2:30 o'clock the following morning, the weather had turned very cold and the ground was damp and cold, and that her train was due to arrive at Wilson, North Carolina, at 12:50 A. M., but did not actually arrive until 2:16 A. M.; that the defendant company has a shed at the passenger station in Wilson, which extends from Nash Street to Green Street, a distance of about 210 yards, and that the passenger station proper is about 55 yards from the center of Nash Street; that upon the arrival of the train at Wilson the Pullman porter put the plaintiff off on the east side of the track, or the side opposite from the one on which the passenger station is located; that the plaintiff begged the porter not to put her off there, and finally convinced the porter that she was either in some strange town or on the wrong side of the track and he then assisted her to disembark on the west side of the track or on the same side that the passenger station is on, but 185 yards from the end of the shed on Nash Street; that some time after the plaintiff was placed on the west side of the track, her son, who had gone to meet her at the station, found her weak, cold, and shivering; that he assisted her to the passenger station and into the waiting- (464) room, where he wrapped her up, after she had warmed, and then placed her in a top buggy, which had curtains, a storm cloth and a blizzard storm cloth like the front of an automobile with isinglass in it, and also a heavy lap-robe, and he then took her to her home, which required something like ten minutes; that when the plaintiff reached her home and was met by her husband, she began to cry and immediately

went to bed, and the next night after she reached home she was taken with sneezing and coughing, and the second night she had a rise of fever; that she grew worse for several days and became unconscious, and had a marked case of bronchitis, and stimulants had to be given to her to keep her heart from stopping; that she had paroxysms of coughing, after which she would fall back in an unconscious condition until more stimulants could be given to rally her pulse.

There was no evidence that the plaintiff was injured by reason of defects in the walkway.

There was other evidence on the part of the plaintiff tending to prove that her sickness was caused by exposure in going from the west side of the train to the station, but no evidence of any physical injury by being put off on the east side of the track.

His Honor charged the jury, among other things, as follows:

1. "Now, if you have found that the defendant was negligent in putting her off or assisting her to alight at that place, and that it was cold and she was chilled and frightened by reason of that, as a proximate cause of that, then you would answer the first issue 'Yes,' without regard to whether or not her sickness was brought on by it as a proximate consequence of the defendant's negligence, because, if she was frightened or suffered inconvenience even, while there upon the ground, and that was caused proximately by the negligent act of the defendant, she would be entitled to recover, and you would answer this first issue 'Yes,' because that would be an injury, if you find that to be so—to be inconvenienced or annoyed or frightened would be an injury, though, of course, not as great an injury as the other allegation of her protracted illness." Defendant excepted.

2. "As I have stated to you before, gentlemen, any fright or
(465) inconvenience or suffering that she suffered on the east side of the track, which was immediately and proximately caused by the defendant's negligence, if there was such negligence—and it is admitted that there was negligence there—she would be entitled to a reasonable compensation for that, whatever was proximately caused by the negligence of the defendant." Defendant excepted.

There was a motion for judgment of nonsuit, which was overruled, and defendant excepted. Verdict and judgment for plaintiff, and defendant excepted and appealed.

Barnes & Dickinson and Woodard & Hassell for plaintiff.
F. S. Spruill for defendant.

ALLEN, J. If the plaintiff had been well and strong, or if there was no evidence that the defendant had notice of her feeble condition,

we would hold that there could be no recovery, except of nominal damages for putting her off on the wrong side of the train, because under such circumstances the evidence in this case would fail to show a breach of duty.

There is, however, evidence that she was feeble; that the defendant knew of this fact, and that she suffered by reason of exposure on the west side of the train, which might have been averted.

Negligence is the failure to exercise ordinary care; but what is ordinary care is dependent upon the circumstances, and is usually a question of fact for the decision of a jury.

The carrier may make reasonable regulations as to the running of its trains, and may determine the part of the train to be nearest the station at stops, having a due regard for the convenience of the traveling public, and providing reasonably safe walkways from the place of egress to the station, and it would seriously interfere with the operation of trains, the maintenance of schedules, and the right of passengers to be transported without unnecessary delay, to impose the duty of stopping each car so that all passengers could alight nearest to the station.

Nor is the carrier required to furnish a nurse or attendant for a sick passenger; but as was said by *Justice Brown* in *Clark v. Traction Co.*, 138 N. C., 82: "The authorities are all to the effect that a degree of attention beyond that due to ordinary passengers should be bestowed on those affected with a disability by which the hazards of (466) travel are increased. The sick, the lame, children, and aged persons are entitled to more care and attention from those in charge of a car than those in full possession of their strength and faculties." *Croom v. R. R.*, 52 Minn., 296; *Sheridan v. R. R.*, 36 N. Y., 39; *R. R. v. Powell*, 40 Ind., 37.

Applying this principle, and considering all the circumstances, we are are of opinion there was some evidence of negligence in putting the plaintiff off on the west side of the track, and that this was the cause of her subsequent sickness.

As the question must be considered by another jury, because of error hereafter pointed out, we forbear to discuss it further, except to say that the jury be instructed, under the evidence as now presented, that they cannot allow any damages on account of sickness, unless they find that the exposure from the time she left the train on the west side until she reached the waiting-room caused it.

The charge on the issue of damages is erroneous.

The damages are awarded as one sum, and his Honor did not confine the recovery for wrongfully putting her off on the east side to nominal damages. On the contrary, he told the jury they might award compen-

satory damages for fright caused on the east side of the train, disconnected from any physical injury, and this is material, because it may be the jury were not satisfied that the exposure after the plaintiff left the train on the west side caused her to be sick, and that the damages awarded were for fright alone.

The statement in *Kimberly v. Howland*, 143 N. C., 403, that, "All the courts agree that mere fright, unaccompanied by physical injury, cannot be considered as an element of damage," is fully sustained by the authorities.

For the error pointed out there must be a

New trial.

JUSTICE WALKER and JUSTICE BROWN, while consenting to a (467) new trial, in deference to the views of the majority of the Court, are of opinion that there is no evidence of negligence upon the part of the defendant, and that the motion to nonsuit should have been sustained.

R. R. MINCEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 March, 1913.)

1. Railroads—Master and Servant—Fellow-servant Act—Interpretation of Statutes.

Where two employees of a railroad company were instructed by their superior to do certain work, requiring the use of a ladder, and a ladder which had been discarded by the company is selected from several supplied by the company, which proves defective, the others being sound, and one of the employes sustains a fall because of the defect and receives the injury complained of and sues for damages therefor, Revisal, sec. 2646, known as the Fellow-servant Act, applies, and the plaintiff is not barred of his recovery, if it should be established that his fellow-servant, who was his superior, selected the ladder without using reasonable care.

2. Same—Kind of Employment—Scope.

The provisions of the Fellow-servant Act (Revisal, 2646) applying to railroads do not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but applies to any other kind of service, whether more or less dangerous. *Twiddy v. Lumber Co.*, 154 N. C., 237, cited and approved.

3. Railroads—Master and Servant—Negligence—Duty of Servant—Reasonable Care.

Held, in this case, that the court properly charged the jury, upon the question of defendant railroad company's negligence in an action for

damages for personal injury received by its employee, that the defendant was not liable for negligence if the danger was so obvious and of such a nature that the servant had equal opportunity as the master to understand and appreciate it, and, being permitted to do the work in his own way, failed in the exercise of reasonable care to avoid the injury.

4. **Railroads—Master and Servant—Contract—Implied Promise—Safe Appliances—Defects—Knowledge of Master—Relative Duties—Ordinary Tools—Damages.**

The duty of the master implied from the contract of hiring, and which he may not delegate to another so as to avoid responsibility, is to provide for his servant reasonably safe tools and appliances, and a safe place to do the work, and to maintain them in such condition as to afford him reasonable protection against injury; and if the servant is injured by reason of a defect in an appliance necessary to be used by him in performing a required service—in this case, a step-ladder—which is known to the master, and unknown to the servant and not discoverable on his examination, while in the exercise of reasonable care, the master is responsible. The doctrine that it is not the duty of the master to inspect tools of simple construction, supplied for the use of the servant, does not apply to the facts of this case, distinguishing *Mercer v. R. R.*, 154 N. C., 399.

APPEAL by defendant from *Carter, J.*, at September Term, 1912, of PENDER. (468)

Plaintiff, while in the employ of defendant as a carpenter, was ordered by C. D. Lupo, who was foreman of his squad, to go with one E. E. Mason and repair a glass door of the paint shop. In order to do the repair work, it was necessary to use a ladder. There was evidence that Lupo told Mason to take the plaintiff with him and do the work. Mason got a ladder, as he testified, placed it against the side of the house and then climbed up the ladder and removed the broken panes in the door. Plaintiff then ascended the ladder with the new panes of blass, and when he reached a point near the top, the ladder broke, the glass dropped from his hands and he fell on the broken pieces and was seriously cut by them. The court submitted the usual issues in negligence cases, which were all answered in favor of the plaintiff, and from a judgment upon the verdict, defendant appealed.

C. D. Weeks and W. P. Mangum Turner for plaintiff.

Davis & Davis, H. L. Stevens, J. T. Bland, and K. O. Burgwyn for defendant.

WALKER, J. In this case there was some evidence to the effect that the ladder selected by Mason and used by him and the plaintiff in doing their work was lying in the shop with several others which appeared to be sound and serviceable, while the ladder in question had been broken on one side and spliced, and it was contended by counsel (469)

for defendant that where the master has provided an adequate and readily accessible stock of suitable appliances, in good condition, from which the servant may make his own selection, and the imperfection of the one chosen, therefore, was or should have been apparent to the servant who selected it, the master is not responsible for consequent injuries to the servant, whether he made the selection or his fellow-servant, citing Labatt on Master and Servant, sec. 603. But this principle was fairly submitted to the jury by the court, as was the question of contributory negligence, and both were found against the defendant. The defendant relied also upon the general principle, thus stated by Labatt, sec. 333: "When the danger is obvious and of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master, or as any one else, of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care." See, also, *Whitson v. Wrenn*, 134 N. C., 86; *Corington v. Furniture Co.*, 138 N. C., 374; *Denny v. R. R.*, 130 N. C., 340; *Hicks v. Manufacturing Co.*, 138 N. C., 319; *Taylor v. R. R.*, 109 N. C., 233. This, we think, was also substantially explained to the jury by the court, so far as it was applicable to the case. It must be remembered that these general rules must be somewhat restricted, when the negligence is imputed to a fellow-servant of a railroad employee, because of the Act of 1897, ch. 56, Revisal, sec. 2646, which charges the master, if a railroad company, with liability for the negligence of a coemployee or fellow servant, as much so as if the delinquent servant had been the *alter ego* or vice-principal, and as such fully represented the master. *Fitzgerald v. R. R.*, 141 N. C., 530. The statute operates alike "on all employees of the company, whether in superior, equal, or subordinate position." *Ibid.*, p. 534. We have also held that the
(470) Act of 1897 applies to an employee of a railroad company, whether at the time of the injury he was engaged in the running or operation of a train or in any other kind of service, whether more or less dangerous. *Simon v. R. R.*, 135 N. C., 181; *Mott v. R. R.*, 131 N. C., 234. In the recent case of *Twiddy v. Lumber Co.*, 154 N. C., 237, *Justice Hoke*, for the Court, considers the subject fully and clearly, reviewing all the authorities.

We have examined the charge in this case very carefully, in connection with the evidence, and it appears therefrom to be manifest that the jury decided the case upon the negligence of Mason, whether he be

regarded as a vice-principal or simply as a fellow-servant of the plaintiff in performing the work assigned to them by C. D. Lupo, the company's manager in that department of its service. There was ample evidence to support this finding of the jury, and as they have acquitted the plaintiff of any concurring or contributory negligence in producing the injury, the defendant must be held liable to the plaintiff in damages for the imputed wrong of Mason. The ladder which was used by the plaintiff under the direction of Mason, it appears, had been discarded by the company as unfit for use. It was spliced on one side, but that was not the side on which it afterwards broke. Plaintiff examined it and thought it was safe and sound before he mounted it. We need not inquire whether it was evidence of negligence to leave this ladder with others then in use, as the case was decided on another ground. The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Bough,* 149 U. S., 368; *Steam-* (471) *ship Co. v. Merchant,* 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring (*Hough v. R. R.,* 100 U. S., 213), and if he fails in the duty of precaution and care, he is responsible for an injury caused by a defect which is known to him and is unknown to the servant. *R. R. v. McDade,* 135 U. S., 554. These principles are fully supported by the following cases in this Court and apply to machinery and tools or implements of simple as well as complicated construction. *Twiddy v. Lumber Co., supra; Reid v. Rees,* 155 N. C., 230 (ladder case); *Orr v. Telephone Co.,* 130 N. C., 627 (*S. c.,* on rehearing, 132 N. C., 691); *Avery v. Lumber Co.,* 146 N. C., 595; *Cotton v. R. R.,* 149 N. C., 227; *Marks v. Cotton Mills,* 135 N. C., 287; *West v. Tanning Co.,* 154 N. C., 44; *Nail v. Brown,* 150 N. C., 533, and *Mercer v. R. R.,* 154 N. C., 399 (hammer case), opinion by *Justice Allen,* in which it is held that the duty of inspection of tools and appliances does not extend to those of simple construction, such as hammers, chisels, axes, and others of like kind, where the employee is assumed to have equal knowledge and ability with the master for discovering the

defect, if any. He is required to use it and, therefore, is in a better situation to discover the imperfection of the implement and report it to the master for repair or the substitution of a new one. But this relaxation of the rule can have no application to a defect of which the master is actually cognizant, and which, as a reasonable man, he should appreciate is likely to result in injury to one using the implement as it is likely to be used, and which is neither known to the employee nor of such a character as to be apparent from the observation which may be expected to accompany its use. In such case the general rule of negligence is fully effective, and the master who knowingly and negligently exposes his employee to a peril unknown to the latter must respond for the damage which results.

It appears that plaintiff could not discover the defect in the ladder by an ordinary inspection or such as he could have made in the use of it, but the railroad company knew of its defectiveness and that it (472) was not suitable for the use to which it was to be applied. It must, therefore, answer for the resultant damage. *Stark v. Cooperage Co.*, 127 Wis., 322. The plaintiff actually made a proper examination of the ladder, before he used it, and failed to find anything indicating that it was weak or unsafe, and the jury exonerated him from any blame and naturally enough confined their further investigation to the negligence of Mason. It is true, the rule is that where fellow-servants are engaged in a common employment, each, in undertaking the service, assumes the risk that the others may fail in that care and vigilance which are essential to his safety; and under this rule, if applicable here, the defendant would not be liable; but not so, for the reason that the statute has excepted this class of cases from the general principle. It is too late now to question the policy or wisdom of making the exception in those cases of railroads where the special risk is no greater nor the particular kind of work more dangerous than when it is done in other employments. It may be discriminating and unjust to make the distinction, but such arguments should be addressed to the Legislature and not to us, who do not make the law, but simply construe it or declare what it is. The argument that the statute was not intended to cover cases of this kind is met by the numerous decisions of this Court holding the contrary, and declaring what is the true meaning of the statute. *Twiddy v. Lumber Co., supra.*

No error.

Cited: *Kiger v. Scales Co.*, 162 N. C., 136; *Tate v. Mirror Co.*, 165 N. C., 284; *Lloyd v. R. R.*, 166 N. C., 33; *Steele v. Grant, ib.*, 641; *Cochran v. Mills Co.*, 169 N. C., 62; *Smith v. R. R.*, 170 N. C., 186; *Deligny v. Furniture Co., ib.*, 202; *Wright v. Thompson*, 171 N. C., 92.

J. C. FOSTER v. RALPH A. CARRIER.

(Filed 12 March, 1913.)

1. **Trespass—Injunction—Indemnity Bond—Orders—Subsequent Motions—Courts—Discretion.**

Where in an action for continuous trespass upon the lands of another an injunction is sought, and upon the hearing of the motion the judge requires the defendant to give a bond indemnifying the plaintiff against damages and permits the defendant to continue to use or go upon the land for a certain purpose eight months after its giving the bond, to which order the defendant did not except, it is *Held*, that after the defendant had complied with the order and availed himself thereof for the period of time allowed, his motion for an extension of time is directed to the discretion of the court, from which there is no appeal.

2. **Trespass on Lands—Damages—Injunction—Financial Responsibility.**

A continuous trespass upon the land of another to its damage is of such a nature that the law will give injunctive relief, irrespective of the question as to whether or not the trespasser is able to respond in damages.

3. **Deeds and Conveyances — Conditions Precedent — Nonperformance — Trespass.**

When one goes upon the lands of another under a deed which was only to be delivered upon his performance of a certain condition, which he has failed to perform, and the deed has not therefore been delivered, he is a trespasser on the lands.

APPEAL by defendant from *Carter, J.*, at December Term, (473) 1912, of ONSLOW.

H. McClammy for plaintiff.
Stevens, Beasley & Weeks and Rountree & Carr for defendant.

WALKER, J. This is an appeal from an order of *Judge Frank Carter*, continuing a restraining order or injunction to the hearing. Plaintiff brought this action to recover damages for trespass upon the lands in dispute and for an injunction against any further trespassing by defendant upon the same. *Judge G. W. Ward* had previously granted a restraining order and an order to show cause why the injunction should not be continued to the hearing, returnable 6 November, 1911. At the hearing on 17 November, 1911, he dissolved the injunction, but upon the express condition that defendant should give a bond in the sum of $10,000 to secure the payment of any damages plaintiff may sustain by reason of the trespass and continued use of the land for the purposes therein described, and upon the further condition "that the privileges of operating the tramroad and going upon said land along the

(474) tramroad shall be restricted to a term of eight months from the date of the filing of the bond," which was 23 November, 1911. Defendant applied to *Judge O. H. Allen* at chambers for an order extending the time of eight months, allowed in the previous order for the operation of the tramroad, for an additional period of one year, and this matter was transferred to *Judge Carter* for a hearing, and was heard at October Term, 1912, when and where he refused the motion for an extension of the time allowed in *Judge Ward's* order for the defendant to operate the tramroad and to go upon the land, and enjoined him until the hearing from entering upon the land and from operating the tramroad. The motion of the defendant was heard upon the original order of *Judge Ward*, and upon affidavits, and *Judge Carter* found that the time allowed by the order of *Judge Ward* had expired, and that no ground appeared for an extension of it or the allowance of additional time.

As defendant did not except to *Judge Ward's* order, but the same was made presumably at his request and for his benefit, and upon the condition that he would not operate the tramroad upon the land longer than eight months after the filing of the bond, we do not see upon what ground he can now claim an extension of the time, as a matter of right. He submitted to the order of *Judge Ward* and accepted it with the condition annexed, and his present motion, therefore, was addressed to the sound discretion of the court.

We are unable to see that the defendant has any legal right to go upon the land to operate the tramroad or for any other purpose. A. M. Prince, a former owner, wrote a letter and executed a paper-writing, purporting to grant permission to defendant to operate the tramroad, but this was never effective, as it was left with Prince's attorneys, to be delivered upon a condition which was never performed. *Lumber Co. v. Cedar Works,* 158 N. C., 161. We do not wish or intend to express any opinion upon the merits of the case, which must be tried out later on, but so far as now appears to us from the present record, the defendant is nothing less than a trespasser on the land. As said in *Lumber Co. v. Cedar Works, supra:* "We disagree with counsel that (475) plaintiff's allegations do not bring its case within the spirit of section 807 of the Revisal. That act distinctly relieves the plaintiff in an action to enjoin a trespass upon land from alleging insolvency 'when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees.' *Lumber Co. v. Cedar Works,* 142 N. C., 417. The complaint in this case alleges both species of trespass and an appropriation of a part of plaintiff's property, without authority, for the purpose of operating a steam railroad over it. Such trespasses as those alleged would have been enjoined at common law,

without the aid of the statute. *Gause v. Perkins,* 47 N. C., 221; *Tise v. Whitaker,* 144 N. C., 511. Even a railway corporation, a common carrier possessing the power of eminent domain, may be enjoined from an extension of its track unauthorized by its charter. The right to enjoin in such cases does not depend upon the insolvency of the corporation, but the remedy is given because of the extraordinary character of the act sought to be enjoined. 1 High on Injunctions, sec. 599; *People v. R. R.,* 45 Barb., 63. It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no power of eminent domain, could seize the lands of another, to which it had no semblance of title, and appropriate them to its own use, simply because it was able to respond in damages. This contention of the defendants is, in our opinion, without support in reason or authority." We see no practical difference between the two cases, and apart from any legal or technical aspect of the case, the first order made by *Judge Ward,* with defendant's consent or acquiescence, expressly restricted the time for defendant to operate the tramroad, and that period of time has expired.

No error.

Cited: Sutton v. Sutton, post, 667.

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(476)

I. S. DAVIS v. HEIDE & CO.

(Filed 19 March, 1913.)

1. **Pilots, Licensed — Unchartered or Unnumbered Boats — Pilotage Fees — Interpretation of Statutes.**

A duly licensed pilot may recover in our courts charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the services of such boat are recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked the owner's license, there being no provision either in our statute, Revisal, sec. 4976, or in the rules of the commissioners, which would deprive him of proper charges for the services of an unnumbered or unregistered boat owned by him.

2. **Pilots—Commissioners of Navigation—Discretion—Scope of Their Powers —Court's Jurisdiction.**

Semble, that under our statute, Revisal, sec. 4976, it is within the discretion of the commissioners of navigation and pilotage as to whether they will revoke the license of a pilot who has violated their rules by

using an unchartered and unnumbered boat; and the courts are without original jurisdiction to determine whether the rules of the commissioners have been violated in this regard.

3. Same—Appeal and Error.

In an action brought in a justice's court by a licensed pilot to recover his fees for pilotage, payment was resisted on the ground that the boat was not registered or numbered, and in the court below it was contended that the commissioners of navigation had held that another pilot, who had sailed the vessel, was entitled to the fees in the sum of $170. *Semble,* the jurisdiction of the commissioners being limited to claims of $60, it did not exist in this case.

4. Appeal and Error—Brief—Exceptions Abandoned.

Exceptions taken on trial in the lower court, not urged in the brief or argument of the appellant in the Supreme Court, are deemed to be abandoned.

APPEAL from *Carter, J.,* at December Term, 1912, of NEW HANOVER.

This action was brought to recover certain pilotage fees. Plaintiff, who is a licensed pilot, with one Sellars, was cruising off the bar at the mouth of the Cape Fear River on 28 June, 1912, when they (477) sighted and spoke the steamer *Manchester Merchant,* having seen a signal or call for a pilot displayed at her masthead. Plaintiff tendered his services to the master of the ship to pilot her over the bar and up the river to the port at Wilmington, N. C., and the offer was accepted. Plaintiff performed the service and the master gave him an order on the defendants, Heide & Co., for the amount of the fees, and, upon its being presented to them, they declined to accept or pay it. This action was then brought before a justice of the peace, where the defendant had judgment, and plaintiff having again met with an adverse judgment in the Superior Court, has brought the case to this Court by appeal. It was agreed that defendants should hold the amount of the pilotage fees in their hands, to abide the final judgment in this action.

The Commissioners of Navigation and Pilotage of the Cape Fear River and Bar passed the following rules and regulations:

"RULE 17. No pilot will be permitted to leave his station to go to a neighboring port for the purpose of piloting a vessel bound from that port for the Cape Fear, unless under peculiar circumstances, at the direction of the chairman of the board. And every licensed pilot is expected and required to provide the means of boarding and leaving vessels at sea by pilot boats or cutters. Arrangements with tugboats or fishing boats or any other means of approaching or leaving vessels at sea will not be permitted under penalty of the revocation of license, at the discretion of the board."

"8 January, 1908.

"On and after 8 February, 1908, Rules Nos. 16 and 17, on page No. 5 of the Port and Harbor Regulations, shall be rigidly enforced:

"*a.* For the proper application of Rule No. 17, it is hereby ordered that each and every boat to be used in the pilotage service shall be fully described by the owners or charterers of such craft, to the chairman of this board, and such boat, being approved by the board, shall, upon application, be registered upon these official records and an official number designated, which number shall be prominently displayed by said boat."

"5 March, 1908. (478)

"*b.* It having been learned by the commissioners that several of the boats at Southport, recently licensed as pilot boats, have failed to display their numbers as ordered, the clerk was instructed to inform the owners of all licensed pilot boats that, unless the orders of the board are obeyed and the official number which has been assigned to each boat is prominently displayed, the license will be revoked."

"7 December, 1910.

"*c.* With reference to the charge against certain pilot boats, that they have been used contrary to the regulations, by engaging in fishing for gain and in competition with other boats regularly engaged in that business, it was ruled by the commissioners that it is not the spirit nor the intent of the board to hamper or embarrass pilots in fishing when they desire to do so, while waiting on their station in the regular way; but the board does positively prohibit the regular use of pilot boats for any other purpose than that of seeking vessels and piloting them in.

"*d.* It was further ordered that all boats numbered and licensed as pilot boats must be used for that purpose, and for no other purpose, and that no boat will be permitted to fish for the purpose of selling fish on the market. Failure to comply with this regulation will cause a revocation of the license and number of the offending boat."

Attention was also directed to Revisal, secs. 4975 and 4976, prescribing a penalty to be paid by a pilot who fails to answer a "pilot signal," or who shall fail to give proper succor in response to a signal of distress from a vessel at sea, and also providing for the removal of pilots who shall be found incompetent or who shall be guilty of "misconduct or misbehavior in office." Section 4976 further provides that, "if after removal a pilot shall attempt to take charge of any vessel, he shall pay a penalty of $200."

B. G. Empie for plaintiff.

Rountree & Carr for defendant.

(479) WALKER, J. It appears that plaintiff had a pilot's license, or what is sometimes called a "branch," which is the nautical term for a warrant or commission, authorizing the holder thereof to pilot vessels in certain waters. The boat in which he was cruising at the time he sighted the *Manchester Merchant* off the bar was not registered and numbered as required by the rules and regulations set out in the case. We held in *Morse v. Heide,* 152 N. C., 625, that the Legislature had the constitutional power to authorize the local board of navigation and pilotage to adopt rules and regulations for the government of pilots and prescribing the manner of performing their duties, and, among others, to limit the cruising grounds beyond which, under the statute, a pilot should not speak a vessel for the purpose of piloting her across the bar. The validity of such a law could not easily be questioned, as the enactment was so apparently necessary for the safe and convenient navigation of vessels at the mouth of the river and in contiguous waters at sea. In that case the pilot had gone to Charleston, S. C., and far beyond the cruising waters of the Cape Fear bar and river, for the purpose of forestalling other licensed pilots of his station, and there, from his pilot boat, the *Herman Oelrichs,* spoke and boarded the ship *Soutra,* standing off the lightship near the Charleston bar, for the purpose of piloting her to the Cape Fear River, through Caswell Inlet. We held that the pilot was acting entirely outside of his rights and beyond the cruising limits, and that, being authorized to collect fees only from ships spoken within the cruising limits, he was not entitled to recover the fees allowed for pilotage within those waters. But that is not our case. Here the pilot was duly licensed, and his only offense, grave though it may have been, consisted in not having registered and numbered his boat. The specific penalty for this omission on his part, as prescribed by the rules of the navigation board, is the forfeiture of his license. In order, therefore, to disqualify him and prevent his tendering his services as a pilot and receiving the fees therefor, previous action of the board was requisite. There is nothing in the statute or in the rules and regulations which deprives him of his fees for this breach of duty until his license is properly revoked upon notice to him. Revisal, sec. 4976. The pilot (480) may be liable to a penalty and the revocation of his license, or, as the statute puts it, "he may be removed from the office of pilot for not complying with this rule," but the forfeiture of his fees is not one of the penalties affixed to his delinquency. No more can it be said that he had lost his right to the fees for his pilotage than of any officer that he had forfeited the fees for his services before being removed from office, unless the law had specifically declared that such should be the penalty. One case we have found, which is in accord with our view, is *The Alcade,* 30 Fed. Rep., 133. By the rules and regulations of the board

of pilot commissioners, who had authority to examine and license pilots, the latter were required to have seaworthy boats, of certain dimensions and not less than 40 tons burden full decked, to cruise outside the Columbia River bar, and in default thereof it was provided that they should be deprived of their warrants or "branches" by the pilot commissioners. With reference to these facts, the Court held that failure to comply with the rule did not take away a pilot's right to his fees, and in this connection said: "But I am satisfied that the question of whether a pilot is complying with the law in keeping a sufficient boat for pilot purposes can only be made before the commissioners. Indeed, it matters not to the master of a vessel, to whom a pilot offers his services on the pilot ground, how he got there. He may have trusted to a canoe or even swam out. If he is on the ground, and ready and capable of taking charge of the vessel, that is all the master can require. . . . The commissioners have the power to deprive a pilot of his warrant for inattention to his duty, or a failure to provide or keep a sufficient boat wherewith to perform the same. The statute has expressly conferred this authority on them, and it is contrary to all the analogies of the law that a dereliction in this respect shall be inquired of collaterally or elsewhere. Indeed, it would be intolerable and interminable if, in every suit for pilotage, the libellant could be required to show to the satisfaction of the court that he had kept a sufficient boat on the bar, sufficiently supplied with 'provisions and water' for the aid of vessels in distress." And in the case of *The Panama,* 18 Fed. Cases, p. 1068, *Judge Deady,* who wrote the opinion in the case just cited, said: "The Legislature has (481) confided the administration of the law in these matters to the pilot commissioners. Whenever it appears that a pilot is evading the law and using his authority to the detriment of commerce or the pilot service, they can and should revoke his warrant." It is doubtful if, under our statute, Revisal, sec. 4976, the board would be bound to revoke the license, even if there had been a violation of their rule. They must have some discretion in the matter, and at least the right to hear first and then decide, otherwise great injustice might be done by hasty and ill-considered action. They may not think, after knowing the facts, that the offense, if committed, called for such severe punishment. At any rate, we are not the judges in such a case to decide in the first instance if the license should be revoked, nor is the Superior Court, but the body to which that duty has been confided by the Legislature is the proper one to make the decision.

It was contended in the court below, and the defense is set up in the answer, that the board had heard the matter and decided that plaintiff was not entitled to the fees, because his boat was not "registered and numbered," but that M. T. Craig of the pilot boat *D. H. Penton,* which

also hailed the *Manchester Merchant,* was entitled to them. But this claim is for $170, whereas the jurisdiction of the board is limited to claims of $60, or, rather, they cannot give judgment for more than that amount, which of course excluded their jurisdiction of this matter. Revisal, sec. 4957 (1). But this contention was not urged in the brief or argument, and, we take it, was intended to be abandoned. *O'Brien v. Larringer,* 36 S. C., 497, cited by the defendant's counsel, is not in point. It is like the case of *Morse v. Heide, supra.* The pilot already on the ship, when the plaintiff in that case spoke her within the cruising ground of St. Helena and Port Royal bars, boarded the ship at Philadelphia. The pilotage rules expressly forbid the collection of fees in such a case.

We conclude that the plaintiff's demurrer to the defendant's answer should have been sustained, instead of overruled, as it was, and for this error we reverse the judgment.

Reversed.

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(482)

J. C. LAYTON v. ELBA MANUFACTURING COMPANY.

(Filed 19 March, 1913.)

Vendor and Vendee—Cotton Seed—"Car-load"—Words and Phrases—Questions for Jury.

Where the buyer of cotton seed in car-load lots refuses a part of the shipment upon the ground that the seller had overloaded the car in order to get the contract price, upon a declining market, and there was no specification as to the quantity or number of pounds to be shipped as a car-load, and the evidence is conflicting as to the number of pounds meant by a "car-load," the question was properly left to the jury.

APPEAL by defendant from *Ferguson, J.,* at November Term, 1912, of HARNETT.

The defendant purchased from the plaintiff at the price of 57½ cents per bushel three car-loads of cotton seed, to be shipped by rail f. o. b. from Dunn, N. C., plaintiff's home and place of business, to Maxton, N. C., where defendant's mill is located. Two of the car-loads were accepted and paid for by defendant, and the dispute arises as to the third car. Each of the first two cars carried 59,000 pounds of seed, in round numbers, while the third car was loaded at Dunn with 78,800 pounds. At Fayetteville, N. C., while the last car was en route to Maxton, 29,000 pounds of the seed were taken from it and placed in another car. This lot, on arrival at Maxton, was accepted by defendant. The other car, which contained the remainder of the seed, the defendant refused to accept, upon the ground that the car had been purposely overloaded,

in order that plaintiff might get the benefit of the contract price for more seed than defendant had agreed to buy, the price of seed having declined. The jury returned the following verdict:

1. Was the quantity of cotton seed shipped in the Southern car No. 40018 greater than a car-load? Answer: No.

2. If so, did excess necessitate a division of the load into separate cars by the railroad company? (No answer.)

3. Did the defendant waive its right to refuse the car-load of seed as shipped? Answer: Yes.

4. In what amount, if any, is the defendant indebted to the plaintiff? Answer: Elba Manufacturing Company due $1,508.41, (483) with interest from 4 October, 1910, to 19 November, 1912."

The defendant offered to pay for the 29,000 pounds of seed at the market price, which plaintiff refused to accept. There was evidence that a car-load of cotton seed, as understood in railroad and business circles, ranges all the way from 20,000 pounds to 75,000, or even 90,000, plaintiff testifying that he had shipped a number of cars of seed containing 80,000 pounds and some 90,000 pounds. It was testified that the rated capacity of the last car, No. 40018, in which the 78,700 pounds of seed were shipped, was 60,000 pounds, but that the maximum quantity allowed by the railroad company's rules, to be transported in it, was measured by its rated capacity, or 60,000 pounds, plus 10 per cent thereof, or 66,000 pounds in all. There was other evidence as to the rules and custom in loading cars, with reference to what is considered a car-load, and all of the evidence was submitted to the jury, with an instruction to find what was an ordinary and reasonable car-load, according to the usage and custom and understanding of railroad companies and shippers. Defendant appealed from the judgment upon the verdict.

N. A. Townsend and E. F. Young for plaintiff.
J. C. Clifford and G. B. Patterson for defendant.

WALKER, J., after stating the case: It was entirely proper for the court to leave the question of what constitutes a "car-load" to the jury. It is not a term of any fixed or definite meaning in the law, but parol testimony was necessary to explain what the parties meant by it. It is a familiar rule that words or terms of doubtful or uncertain meaning may be explained by extrinsic evidence. It is said by a recent text-writer that "testimony as to the nature of the subject-matter referred to in a document, so as to enlighten the court in respect to it, may be given. It very frequently happens that the language of a contract leaves it uncertain to just what the parties referred, and it is impossible for the court to enforce its provisions, or to compute damages under it, with-

(484) out some explanation." McKelvey on Evidence, p. 462, sec. 301; 1 Greenleaf on Evidence (14 Ed.), sec. 288. In *Bullock v. Finley*, 28 Fed. Rep., 514, the Court applied the rule we stated above with reference to this very term, "car-load," in the contract then in question, and said: "If nothing was agreed as to the quantity to make a 'car-load,' then the usual and established custom as to quantity in that business and trade, at the time and place of the contract, would fix the quantity meant by a 'car-load' between the parties; and if no such usage or custom is shown, then what a car of usual capacity, used in carrying such freight, could carry, would fix the quantity intended by the parties. In ascertaining what was meant and understood as to quantity, you must consider all the circumstances connected with the transaction between the parties disclosed in the evidence." *Cabinet Co. v. Herrman*, 7 Ind. App., 462. It was held in *Goode v. Railway Co.*, 92 Iowa, 271, that, "when a general custom fixes a 'car-load' at a certain number of pounds, the law presumes that a shipping contract which does not define the term was made with reference to such custom." There was conflicting evidence introduced as to the meaning of the term "car-load" in shipping circles, and it was for the jury to say, under the instructions of the court, what the parties really meant in view of this general custom and usage. It is to be observed, also, that on an average, that is, if the total number of pounds is divided by three, the plaintiff shipped nearly 1,200 pounds less than three car-loads, estimated by the rating of the railroad company, which was 60,000 and 10 per cent added. This is not conclusive on the defendant, but it tends to repel the charge that the plaintiff was overloading the last of the three cars for the purpose of obtaining the contract price for a larger quantity than was bought by the defendant. There was also evidence of a waiver on the part of the defendant of exact compliance by plaintiff, or of facts which amounted to an election to take the last "car-load."

No error.

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(485)

SCOTTISH FIRE INSURANCE COMPANY ET AL. v. STUYVESANT INSURANCE COMPANY.

(Filed 19 March, 1913.)

1. Insurance, Fire—Reinsurance—Identical Property—Reinsurer—Insurance Retained—Notice—Waiver.

When one insurance company reinsures a risk in another company with a provision in the policy that as a condition thereof the reinsured company "is to retain an amount of insurance on the identical property therein described," or the reinsurer company would not be otherwise

liable, with the further statement that the reinsured company retains a certain specified amount of insurance "on same property," and it appears from the amount of insurance in force, stated on the policy, that this stipulation has not been and cannot be complied with, the reinsuring company, by accepting the policy, takes with notice, and waives the provisions thereof.

2. Insurance, Fire—Reinsurance—Actual Loss—Issues—Burden of Proof.

When a fire insurance company has issued a policy on a certain structure and its contents, and has reinsured a part of the risk with another company, and, having paid a loss by fire on the property, seeks to recover on the reinsurance contract, it is necessary for it to show that the identical property covered by the policy sued on has been damaged or destroyed, and an issue as to the actual loss thereon should be framed, with the burden of proof on the plaintiff, except in instances of a valued policy permitted by law.

3. Insurance, Fire—Reinsurance—Actual Loss—Identical Property—Evidence.

The plaintiff insurance company sued to recover for a loss by fire it had paid under a reinsurance contract containing a provision that it should retain a certain amount of insurance on the identical property covered by the policy, which it did not do, and which, under the surrounding circumstances, the reinsurer is found to have waived: *Held*, the evidence was properly confined to the loss sustained on the property covered by the reinsurance policy sued on, and the stipulation as to the insurance to be retained cannot be extended to property not covered by the policy, although in the same house.

4. Insurance, Fire—Proofs of Loss—Evidence and Damages.

In an action to recover damages sustained to property which was covered by a policy of fire insurance issued by defendant company, the proofs of loss are not competent as substantive evidence of the amount of the loss or the value of the property.

APPEAL by plaintiff from *Lyon, J.*, at March Term, 1912, of (486) MECKLENBURG.

This action was brought by the plaintiffs, the Scottish Fire Insurance Company and the Monongahela Fire Insurance Company, against the defendant, the Stuyvesant Insurance Company, to recover of the defendant, under policies of reinsurance, $702.87 and interest, money claimed to have been paid by it to Jasper Miller & Sons Company, the insured in the original policies. The plaintiff Scottish Fire Insurance Company had issued to Jasper Miller & Sons Company its policy No. 12109, for $1,400, on certain fixed and movable machinery, tools, implements and utensils, electrical equipment, motors and dynamos, while contained in their one-story metal-roof brick building, situated at No. 210½ south side of East Fifth Street, Charlotte, N. C., and also its policy No. 12102, for $500, on cotton in bales or bags, and other material, while

contained in the same building. Thereafter this business of the Scottish Insurance Company was taken over by the Monongahela Insurance Company, but prior thereto the Scottish Insurance Company had reinsured with the defendant in an amount not to exceed $1,150 against loss by reason of its liability as insurer under its policy No. 12109, and in an amount not to exceed $250, against loss by reason of its liability as insurer under its policy No. 12102, the defendant's policies being numbered 63689 and 63690. The defendant accepted notice of the assumption of the Scottish Insurance Company's business by the other plaintiff, the Monongahela Insurance Company, and agreed to become and remain bound to the Monongahela Insurance Company, upon the same terms and conditions as they had theretofore been bound to the Scottish Insurance Company. The latter transaction was on 27 January, 1910. Attached to both of defendant's policies of reinsurance was the following written condition:

"It is a condition of this reinsurance that the reinsured company is to retain an amount of insurance on the identical property herein described, and failing so to do, this company shall not be liable for (487) any loss which may occur under this policy.

"Scottish retains $750 on same property."

The whole of this condition, in both instances, was typewritten, except the figures following the dollar mark in the last line, these figures being written in ink at the time the policies of reinsurance were issued.

The plaintiffs, as a matter of fact, did not retain $750 insurance on the identical property in either instance, but, on the contrary, only retained and kept in force $250 insurance in each instance, on the identical property. The plaintiffs, however, did have in force at that time, and at the time of the fires hereinafter mentioned, other policies of insurance issued by them to Jasper Miller & Sons Company on other property in the building, and upon the building itself.

Thereafter, in the months of February and April, 1910, certain of the property located in the brick building was destroyed by fire, and the plaintiffs paid Jasper Miller & Sons Company certain sums of money, aggregating more than the amount sued on in this action, upon the various losses; the evidence offered by plaintiffs going to show a payment of $480 under policy No. 12102, $104.77 under policy No. 12109, and $442.65 under policy No. 12109.

Speaking generally, the plaintiffs' contentions are that by reason of the fact that they had policies in force with Jasper Miller & Sons Company covering other property in the brick building and covering the building itself, that, therefore, they retained ample insurance to cover the condition and agreement in the policies of reinsurance in regard to retaining $750 on the same property; that even if they did not have

and retain $750 of insurance on the identical property in each case, the defendant had waived the condition. The defendant, on the other hand, contending that it was expressly agreed in and as a condition of both the policies of reinsurance that it should not be liable for any loss which might occur under its policy of reinsurance, if the plaintiff companies failed to retain in each instance $750 of insurance on the identical property reinsured in these policies of reinsurance; that the language of the contract was plain and unequivocal and could mean noth- (488) ing else.

These issues were submitted to the jury, and answered as follows:

1. Were special contracts of insurance, mentioned in the complaint, issued by the defendant and delivered to the plaintiffs? Answer: Yes.

2. Did the defendant accept notice of reinsurance contract between the plaintiffs and continue in force all contracts of reinsurance previously issued to the Scottish Fire Insurance Company, in the name of and for the benefit of the Monongahela Insurance Company, according to the terms of said contracts? Answer: Yes.

3. Did the fires occur and were payments made to the original assured named in the Scottish Fire policies, as alleged in the complaint under these policies, Nos. 12102 and 12109? Answer: Yes.

4. Were the special contracts of insurance mentioned in the complaint voided by reason of any misrepresentations or breach of warranty on the part of the plaintiffs, as alleged in the answer? Answer: No.

5. Is the defendant indebted to the plaintiff? If so, in what amount? Answer: $475.83.

Judgment was entered upon the verdict, that plaintiffs recover of defendant the sum of $475.83 and interest, and both parties appealed.

J. F. Flowers for plaintiff.
Clarkson & Duls for defendant.

DEFENDANT'S APPEAL.

WALKER, J. This appeal raises the question whether the policies of the defendant were void by reason of the fact that the plaintiff the Scottish Fire Insurance Company failed to retain $750 of insurance on the identical property insured by the defendant. It is plain, as it appears to us, that defendant must have known all along that the plaintiff had not retained $750 of insurance in each case or in either case. We do not see how it was possible to do so, as the total insurance (489) was only $1,900, whereas if plaintiff had complied with the provision as to the retention of insurance, it must have amounted to $2,900 under the two policies, as the clause was inserted in each of the policies. It may be that the amount to be retained was intended to be $250,

instead of $750, but it makes no difference how this is, as the defendant is charged with notice that the plaintiff had not complied with the stipulation. This is a waiver of it. It was held in *Hornthal v. Insurance Co.*, 88 N. C., 71, that a material fact stated as to additional insurance on the same property insured by defendant, with knowledge of its agent that the fact was not truly stated, was a waiver of the requirement prohibiting other insurance without the written consent of the company, citing *Insurance Co. v. Wilson,* 13 Wall. (U. S.), 222. And in a case where there had been a substitution of one company for another as an insurer, or one of the insurers, with the knowledge of the defendant, through its agent, of the fact, and without any objection thereafter, it was held to be a waiver of the change in the insurance and the requirement that it should have notice thereof (*Collins v. Insurance Co.*, 79 N. C., 279), the Court saying, by *Justice Reade:* "The breach of any condition in the policy as against an increase of risk or the keeping of certain hazardous goods, or indeed the violation of any of the conditions of the policy may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken." *Argall v. Insurance Co.*, 84 N. C., 355, which holds that a breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived.

The defendant further objects to the form of some of the issues, but as they can be reformed, if required, at the next trial, it is not necessary to consider this exception, except as to one of the issues, that is, the third. Defendant objects to this issue because it does not include any inquiry as to the amount of the actual loss or damage to the identical property insured. The third issue may not be objectionable for
(490) this reason, but there should be an issue and a finding as to the actual loss of the Scottish Fire Insurance Company. The right of recovery is based upon a loss by it. There is no issue bearing upon this question, and we doubt if there is any evidence of the fact of loss. But actual loss must be shown, as the reinsurance is as much a contract of indemnity in this respect as the original insurance. "In ordinary cases of reinsurance the reinsured, in order to recover on the contract, is obliged to prove the subject at risk and the loss thereof in the same manner as if the first insured were the plaintiff and the action were upon the original policy. The reinsured must show that a claim exists against him for the loss, and the claim is valid. Where the reinsured has paid the loss he cannot by showing the mere fact of payment establish a sufficient proof of the loss and thereby place upon the reinsurer the burden of showing that the loss was wrongfully paid. In respect to these requirements, no distinction exists between reinsurance and

original insurance." 24 Am. & Eng. Enc. of Law (2 Ed.), 263; *R. R. v. Insurance Co.,* 98 Mass., 420; 117 U. S., 323, and cases cited; *Insurance Co. v. Telfair,* 45 App. Div. (N. Y.), 564. And again: "In ascertaining the amount recoverable on the contract of reinsurance, the amount which the reinsured has actually paid to discharge his liability to the original insured is not material, unless, of course, the contract of reinsurance otherwise provides; in brief, the material inquiry is, not what the reinsured has paid, but what he has become liable to pay by reason of the loss." 24 Am. & Eng. Enc. of Law, p. 265.

It is incumbent on the plaintiff, the insured, in an action on a policy of fire insurance, to prove the amount of his loss or damage, and that it was due to fire within the provisions of the policy, and, except where it is not a valued policy permitted by law, he must prove the value of the property destroyed, or of his interest therein (19 Am. & Eng. Enc., 938, and cases in notes), unless the amount of the loss is admitted.

There was error, therefore, in not having this fact, as to the amount of the loss, found by the jury, and we therefore order a new trial in the defendant's appeal. The policy provides for the method of computing the defendant's share of the loss, when ascertained. (491)

New trial.

PLAINTIFF'S APPEAL.

WALKER, J. This appeal was taken to review the court's ruling, by which the losses alleged to have been paid by plaintiff were confined to those which were sustained under policies No. 12102 and No. 12109, and by which also plaintiff was prevented from showing that it had issued policies of insurance on other property in the building not covered by policies 12102 and 12109. We do not see any error in this ruling, as the two policies, 12102 and 12109, only covered the property therein particularly described, and could not be extended so as to include other property, and the clause in the policy requiring the Scottish Fire Insurance Company to retain a portion of the risk is restricted, by its explicit terms, to insurance upon the identical property described therein. As we have said in defendant's appeal, the plaintiff was required to prove that the said property, that is, the identical property insured, had been injured or destroyed by fire, and the amount of the loss, in like manner as Miller Sons Company would have been required to do if they had been suing the Scottish Company on their policies, the mere fact that a fire occurred and that plaintiff paid a certain sum to Miller & Sons Company not being a sufficient finding upon which to base a judgment. The proofs of loss are not competent evidence as to the amount of the loss or the value of the property. 19 Am. & Eng. Enc. of Law, 948; *Insurance Co. v. Gould,* 80 Ill., 388; *Rosenberg v. Insurance Co.,* 209

Pa. St., 336; *Neesey v. Insurance Co.*, 55 Iowa, 604; *Insurance Co. v. Doll*, 35 Md., 89; *Breckinridge v. Insurance Co.*, 87 Mo., 62. The proof is only evidence of the fact that it was furnished to the company.

The policies 63689 and 63690 of the defendant reinsured the property covered by policies 12102 and 12109, which had been previously issued by the plaintiff Scottish Fire Insurance Company to Miller & Sons Company, and it was only for the loss of this property that defendant
(492) contracted to be liable to the plaintiff when the reinsurance was effected, and the inquiry was properly confined to it by the court.

No error.

E. J. VAUGHAN v. W. P. EXUM ET AL.

(Filed 10 March, 1913.)

1. Notes—Fraud—Misrepresentation—Other Acts—Evidence.

Where payment upon a note is resisted for fraud in its execution, evidence is incompetent which seeks to show that fraud had been practiced by the plaintiff in procuring similar notes from others who are not parties to the action.

2. Notes—Fraud.

The burden is on defendant to show the fraud in the execution of a note which they allege as a defense in plaintiff's action to recover thereon, and a motion to nonsuit upon the evidence cannot be sustained.

3. Vendor and Vendee—Contracts—Fraud—False Representations—Intent—Knowledge.

In this action upon a note given in the purchase of a stallion, wherein the defense of fraudulent misrepresentation is set up as to the value of the animal, or qualifications affecting the value, the charge of the court is not erroneous that the law does not deem it a fraud or false pretense for a seller of goods to puff his wares, etc.; but it would be otherwise if the representations of value were made as an inducement to the other party to enter the contract with the intent he should rely on them, which were false to the knowledge of the seller and relied on by the purchaser, who acted without knowledge.

APPEAL from *Carter, J.*, at November Term, 1912, of LENOIR.

These issues were submitted:

First. Is the plaintiff the owner of the note sued on in this action? Answer: Yes.

Second. Was the execution of the note induced by fraud and misrepresentation? Answer: No.

Third. Was the plaintiff purchaser of said note in good faith, for value, and without notice of any fraud and misrepresentation? (493) Answer:.....

Fourth. What amount, if any, is plaintiff entitled to recover? Answer: $500 and interest from date of note.

Defendants appealed.

C. G. Moore for plaintiff.

George V. Cowper and T. C. Wooten for defendants.

BROWN, J. This action is brought to recover on a sealed note for $500, executed by defendants to McLaughlin Brothers and indorsed to plaintiff.

It is alleged, and denied, that plaintiff is a holder in "due course." Under the finding of the jury, it is unnecessary to consider this phase of the case. Unless there is reversible error as to the first and second issues, the plaintiff is entitled to judgment.

There are a number of exceptions relating to testimony, most of them similar in character and equally without merit.

For illustration, we select two of the questions and answers excluded by the court in the deposition of plaintiff and excepted to by defendants:

"What defenses were usually interposed to the notes when sued upon? A. I think that one of the answers was fraud—lack of consideration.

"Q. Has the defense of fraud or misrepresentation ever been interposed in any of the suits brought? A. I won't be able to answer that until I see the pleadings in the case; two or three of them; I do not recall; I just remember one case."

It requires no argument or citation of authority to show that these questions and answers have no relevancy whatever to the issues in this case.

This action is brought to recover on a note admitted to be executed by the defendants. The defenses set up are that the plaintiff is not the owner, that he is not a holder in "due course," and fraud in the execution.

Although it was admitted that the note sued on was given for part purchase money of a stock stallion, it is entirely irrelevant and incompetent to prove what defenses were interposed in other actions on notes given for purchase money of other stock horses. (494)

Upon the first issue the evidence is plenary that the plaintiff is the owner of the note, and the court might well have instructed the jury that if they believed the evidence to answer the first issue "Yes." But his Honor left the question open to the jury and stated the defendants' contentions upon the evidence with unusual clearness and particularity. They have nothing to complain of in that respect.

The motion to nonsuit could not possibly be sustained, as the burden of proof was on the defendants to make good their plea of fraud. *Bank v. Fountain,* 148 N. C., 590. Having failed to make good that plea, the plaintiff, being the owner of the note, is entitled to recover, whether he has proven that he is the owner in due course or not.

Upon the issue of fraud the defendants contended that the agent of McLaughlin Bros., the payees in the note, had made false representations in regard to the capacity of the horse as a foal-getter and as to value of the animal. There is no other evidence of fraud in the record.

The defendant excepts to this instruction upon the issue of fraud:

"The law does not deem it a fraud or false pretense for a seller of goods or property to puff his wares by bragging on them as men ordinarily brag upon the property they are selling; but representations of value, if they are made as an inducement to the other party to enter into the contract, and with the intention that the other party shall rely upon such representations, and such representations are false to the knowledge of the person making them—that is, of the vendor—and the vendee does rely upon such representation, and is induced to enter into the contract, the law deems that a fraud has been committed. To summarize this phase of the law, the court instructs you that assurances of value known to be false by the person making such assurances, and made and intended to be relied upon and which induced the contract, are fraudulent; and this is especially true where one party knows
(495) the situation and the other party is ignorant of it."

This is a correct summary of the law and is supported by our precedents. *Hill v. Gettys,* 135 N. C., 375; *Cash Register Co. v. Townsend,* 137 N. C., 652.

The charge of the court presented every aspect of this case fully and fairly to the jury, and we find nothing in it of which defendants can justly complain.

No error.

Cited: Ipock v. Gaskins, post, 684.

L. L. DAMERON AND WIFE v. ROWLAND LUMBER COMPANY.

(Filed 19 March, 1913.)

1. Deeds and Conveyances—Reformation—Equity—Mutual Mistake—Innocent Purchasers—Time of Notice.

Where a suit is brought to correct a deed to standing timber on a larger acreage of land than was intended by the parties, for mutual mistake, against one claiming to be an innocent purchaser for value, without notice, an issue is presented as to whether the defendant had notice of the plaintiff's equity at the time he bought the timber from the plaintiff's grantee, and paid for it; for if he did not have notice at that time, he acquires title to the timber embraced in the conveyance free from the equity sought to be established.

2. Same—Pleadings—Evidence—Burden of Proof.

A conveyed the timber growing on certain described lands to B, who conveyed to C. Thereafter C obtained from A a conveyance, referring for description to the first deed, granting an extension of time within which to cut and remove the timber. In a suit brought by A against C to correct the deeds for mutual mistake in the quantity of timber conveyed, the plaintiff must either show that C purchased from B with knowledge of his equity, or allege and prove that there was mutual mistake in the conveyance extending the time for cutting the timber.

3. Deeds and Conveyances—Reformation—Equity—Mutual Mistake—Fraud.

A deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is mutual; or when the mistake of one party is brought about by the fraud of the other.

4. Hypothetical Questions—Evidence.

A hypothetical question which presupposes the existence of facts of which there is no evidence is incompetent.

APPEAL from *O. H. Allen, J.*, at February Term, 1912, of SAMPSON. (496)

Civil action. These issues were submitted to the jury:

1. Was the description of the land in the original timber deed from the plaintiff to H. L. Pope, trustee, inserted by the mutual mistake of the plaintiff and said Pope? Answer: Yes.

2. At the time of the execution of the extension deed referred to in the complaint was all the timber on plaintiffs' lands embraced in said deed by the mutual mistake of the parties? Answer: Yes.

3. If so, what land was intended by them to have been described therein? Answer: Yes; the seventy-five (75) acres of land in Motley Branch, Ward's Swamp, and the Great Coharie up to the line chopped by Mr. Joe Faison the first time.

4. Is the plaintiffs' cause of action barred by the statute of limitations? Answer: No.

5. What damages has the plaintiff sustained by reason of the cutting and removal of the timber on the lands of the plaintiffs, other than the 75 acres referred to in the complaint? Answer: $1,308 damage.

The defendant appealed.

H. A. Grady and Fowler & Crumpler for plaintiffs.

A. McL. Graham and G. E. Butler for defendant.

BROWN, J. This action is brought to correct the description in a deed for timber executed in 1892 by plaintiffs to H. L. Pope, which is as follows:

"Bounded by the lands of James Warwick, Redet Carr, Dr. Benton, and Calvin Bowden, being the same property deeded to me from J. D. Packer and wife, registered in Book 43, page 513, etc., containing 75 acres, more or less. Timber to be cut 12 inches and upwards across the stump."

The defendant acquired title by mesne conveyances, and on 21 December, 1906, the timber being uncut, purchased from plaintiff an extension of time, evidenced by extension deed duly executed, and under (497) that contract defendant has proceeded to cut the timber not only on the 75 acres, but on the entire land described in the Packer deed.

The allegation of the complaint upon which the Pope deed is sought to be reformed is as follows:

"That said deed calls for only 75 acres of timber on a tract of 216 acres, said 75 acres lying on the south end of said tract and at the time of the execution of said deed to said Pope, cutting off from said 216-acre tract the 75 acres of land upon which the timber was sold. That in drawing the deed for said timber, through the inadvertence of the draftsman, the boundaries of said 75-acre tract were left out, and while said deed calls for only 75 acres, yet the description therein covers all of the lands of the plaintiffs. Said error was not known to the plaintiffs until a few days prior to the commencement of this action, and was due to the mutual mistake of the parties thereto."

It is admitted that the deed as written covers the timber on all the land described in the Packer deed, that being the controlling description.

The defendant claims to be a *bona fide* purchaser for value and without notice of the alleged claim of plaintiff, and tendered this issue:

"Did the defendant, Rowland Lumber Company, at the time it purchased the timber in question from the North State Lumber Company (Pope's grantee), have notice of any mistake on the part of the plaintiff and Pope in the execution of the original timber deed? Answer: ....."

His Honor erred in not submitting such issue in the present state of the pleadings.

It is not material that defendant had notice at the date of the extension deed. It had then bought and paid for the timber conveyed by the deed from plaintiffs to Pope. The defendant's rights as to the quantity of timber acquired is to be determined by the date of the purchase from the North State Company, Pope's grantee, except as hereinafter stated.

If at that time the defendant had no actual or constructive notice of the plaintiff's equity, and was a *bona fide* purchaser for value, it acquired title to the timber in controversy, and the extension of the time of cutting by plaintiffs did not affect it. (498)

The action is not brought to reform and correct the extension deed, as we understand the complaint. That deed refers to the deed to Pope, Book 80, page 447, for a description of the land, and the extension by its very terms applies to all the timber covered by the Pope deed.

By proper amendment to the complaint the plaintiffs will be permitted to set out another cause of action and to prove, if they can, that the descriptive words of the extension deed were inserted by mutual mistake of the plaintiffs and the defendant, the Rowland Lumber Company, and that the extension deed was intended to apply only to the cutting of timber on the 75 acres, alleged to have been marked out at the time.

If the plaintiff shall succeed in properly establishing that allegation, the issue tendered by defendant, *supra*, would be immaterial. The rights of the defendant would then be determined by the extension deed.

As this case is to be tried again, we will repeat, what has been often decided, that a deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is mutual, that is, the mistake of both parties, or else upon the mistake of one party brought about by the fraud of the other.

We will notice one exception to evidence. Arthur Lee, surveyor, was permitted to testify as follows:

"Suppose you had been given a deed that called for 75 acres in the lowgrounds of Motley Branch, Ward's Swamp, and Great Coharie, where would you have located it?

"Answer: I would have gone to what we call water oak on Big Coharie, at Carr's corner, and run south until I came to the edge of the creek; from the edge of the creek down until I got to the plantation, then the plantation to the end of it; then I would have taken that Motley Branch land up here (indicating on map) as far as it would take to get it."

This evidence is incompetent and should have been excluded. The question was purely hypothetical. It presupposed a deed not in existence and facts not in evidence.

New trial.

(499)

E. J. ISLER v. HART & HARRINGTON.

(Filed 19 March, 1913.)

1. Judgments—Res Judicata—Execution—Injunction—Practice—Direct Proceedings.

Where in proceedings in summary ejectment on final judgment entered in the Superior Court it has been adjudicated that the plaintiff in the present action was the tenant of the defendant herein, which judgment was not appealed from, the matter is *res judicata*, and the plaintiff herein, the defendant in the former action, cannot maintain his suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings.

2. Same—Collateral Agreement—Mortgage—Possession.

It having been adjudicated in a former action that the plaintiff did not have title to the lands in dispute, he sets up a collateral agreement in this action by which he was to buy the lands, and contends that he can enforce this agreement on payment of the purchase money: *Held*, an injunction should not issue to restrain an execution under the former judgment, and the plaintiff must surrender possession before bringing action.

APPEAL by plaintiff from *Carter, J.*, at Spring Term, 1913, of LENOIR.

Rouse & Land for plaintiff.

T. C. Wooten and Y. T. Ormond for defendants.

CLARK, C. J. The defendants brought an action in summary ejectment before a justice against the plaintiff, and recovered judgment. On appeal, this judgment was confirmed. On the issues submitted in the Superior Court the jury found that this plaintiff was tenant of these defendants, that the tenancy had terminated, and that they were entitled to recover possession and $82 for rent and damages up to the trial. There was no appeal.

The plaintiff in this action alleges that he was originally owner of the premises, and that he rented them from the defendants, who pur-
(500) chased at the sale under a mortgage executed by him, and that they agreed to permit him to redeem, and that he had made payments in pursuance of such agreement; and he asks for an injunction to restrain the execution of the judgment of the Superior Court in the former action and that he be kept in possession pending an accounting, and that he be allowed to redeem the land upon ascertainment of the balance due.

The defendants rightly contend that it being *res judicata* that this plaintiff is a tenant of these defendants and they having judgment to recover possession of the premises and rent and damages for its deten-

tion, he cannot restrain the execution of such judgment, and that if he has any cause of action of the nature alleged in his complaint, he must first vacate the premises. This is well-settled law. *Davis v. Davis,* 83 N. C., 71; *Parker v. Allen,* 84 N. C., 466; *Hahn v. Latham,* 87 N. C., 172; *Foster v. Penry,* 77 N. C., 160.

Besides this, the old system which recognized a distinction between law and equity, and under which a plaintiff could recover a judgment at law and yet in a proceeding in equity be restrained from the execution of the judgment of a court of competent jurisdiction, has been happily abolished since the adoption of the Constitution in 1868. We have no longer such palpable anomalies in our procedure. If the defendant had a defense, he should have set it up in the same proceeding, which should thus settle once for all the entire controversy. This plaintiff having been found in the former action to be a tenant of these defendants, and they having been adjudged to be entitled to possession, he cannot be heard to question the validity of that judgment nor to restrain its execution except in a direct proceeding to set aside the judgment for fraud, irregularity, or excusable neglect or mistake, none of which things are alleged.

The plaintiff must obey the judgment of the court and surrender possession in obedience thereto. He cannot maintain this action to restrain the execution of such former judgment.

The defendants herein further contend that even if the plaintiff surrenders possession, he cannot maintain this action upon allegations of an agreement to purchase the premises and for an accounting for the payments which he alleges he had made thereon, because (501) these matters should have been set up in the trial in the Superior Court, in which the jury found, upon issues submitted, that the plaintiff was their tenant. Whether or not the plaintiff, when defendant in the former action, could have set up in the trial in the Superior Court, on appeal from the justice, the demand for affirmative relief, for an accounting and for leave to redeem, he could, not only in that court, but before the justice, have set up the *defense* that he was not a tenant, but that he held under an agreement to buy. The verdict and judgment are conclusive that he did not so hold, but that he was a tenant.

The plaintiff's contention that, notwithstanding his being a tenant he had a collateral agreement to buy the land which he can enforce upon tender of the purchase money, and the defense of *res judicata*, are matters not yet passed upon by the court below. It is sufficient to say in this case that the injunction should not have been issued and that the plaintiff must surrender possession.

Reversed.

WALKER, J., concurs in result.

(502)

EQUITABLE MANUFACTURING COMPANY v. J. A. SEXTON.

(Filed 19 March, 1913.)

1. Courts—Justices of the Peace—Goods Sold and Delivered—Verified Statement—Prima Facie Case—Interpretation of Statutes—Rebuttal.

In an action before a justice of the peace for the purchase price of goods alleged to have been sold and delivered, the verified itemized account is made *prima facie* evidence by Revisal, sec. 1625, which may be rebutted.

2. Same—Evidence—Questions for Jury.

Where a *prima facie* case is made out under Revisal, sec. 1625, in an action for goods alleged to have been sold and delivered, and the defendant introduces evidence tending to show that they had been shipped to him without his knowledge, and that when he ascertained the name of the shipper he at once notified him that the goods were subject to his order and asked disposition, it was not incumbent upon the defendant to send the goods back till he received the instruction asked for, and the evidence, if the jury finds it to be true, rebuts the *prima facie* case; and the fact in this case, that the defendant kept the goods in his store for more than a year, affected only the credibility of his evidence in its consideration by the jury.

3. Courts—Justices of the Peace—Goods Sold and Delivered—Pleadings—Denial—Issues.

Where an action for the sale and delivery of goods is brought in a court of a justice of the peace, and the defendant admits that his clerk had the right to buy the goods, but denies the account, an issue is raised as to whether the goods had been purchased, and his liability for their payment.

APPEAL by defendant from *Ferguson, J.*, at November Term, 1912, of HARNETT.

No counsel for plaintiff.
Clifford & Townsend and D. H. McLean & Son for defendant.

CLARK, C. J. This case was tried on appeal from a justice of the peace. Plaintiff introduced an itemized statement of account, duly verified, for a lot of jewelry alleged to have been sold and delivered to the defendant, price $125, and rested. The defendant testified that he had never ordered any goods from the plaintiff; that some goods of the description set out in the plaintiff's verified account came, but he did not know from whom, and when he did find out, he notified the plaintiff that they were held subject to its order; that he had not sold any of the goods nor authorized them to be sold, nor have any been sold, so far as he knows; that a day or two before he was served with warrant.

he received a letter from the plaintiff to ship the goods back, and he tendered them to the plaintiff's attorney, who refused to receive them; that the goods were shipped to him without authority and were received by some clerk and placed in the store without his knowledge.

The verified itemized account is made *prima facie evidence.* Revisal, 1625. But the evidence of the defendant above stated (503) was competent in rebuttal, and should have been submitted to the jury. It was error to direct the jury, if they believed the evidence, to render a verdict for the plaintiff. If the defendant's evidence was believed, he rebutted the *prima facie* case shown by the verified account.

We learn that his Honor was impressed by the fact that the goods were in the possession of the defendant from May, 1908, to December, 1910. But the explanation of the defendant, if believed, is that he was not aware that the goods were in his store for some time, and that the first intimation he had was the receipt of a dun for the amount, and that he thereupon notified the plaintiff that he held the goods subject to its order. It was not incumbent upon him to send the goods back till he received the instruction of plaintiff in reply, and if it is true, as the defendant testified, that he did not order the goods and had not authorized any to be sold, and that he notified plaintiff that he held them subject to his order, whatever inference might be drawn from his long possession of the goods was a matter of fact for the jury, and not one of law for the court.

It is true that the justice in his return sets out that in the trial before him the defendant admitted that his clerk had the right to purchase goods, but he added that the defendant "denied this account." So the issue was raised. There was no evidence that any clerk ordered the goods. The verified account being only *prima facie* evidence, in instructing the jury to return a verdict for the plaintiff, there was

Error.

W. F. HUNTER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 March, 1913.)

1. Justice's Court — Appeal — Excusable Neglect — Recordari — Appeal and Error—Findings of Fact.

An appeal presently lies from an order of the Superior Court granting a motion for a writ of *recordari* to a justice's court and directing that the cause be set down for trial *de novo*, and the trial judge should find and declare the facts upon which he based the order, when it is appealed from to the Supreme Court.

2. Justice's Court — Appeal — Excusable Neglect — Appeal and Error — Meritorious Defense—Practice.

On appeal from an order of the Superior Court allowing a writ of *recordari* to a court of a justice of the peace on the ground of excusable neglect of a party or his attorney in not perfecting his appeal from an adverse judgment therein rendered, it must be shown that the defendant had a meritorious defense, or the order appealed from will be held as reversible error.

(504) APPEAL by plaintiff from *Carter, J.,* at January Term, 1913, of LENOIR.

Cause heard on petition for *recordari* to justice court.

From the affidavit of defendant's counsel, the only evidence offered, it appeared that on 4 June, 1912, at and in Lenoir County, plaintiff recovered judgment against defendant, the Atlantic Coast Line, for wrongful failure to ship certain household goods of plaintiff from Fargo, Ga., to Enfield, N. C., the same being, in breach of contract of carriage, sent to Efland, N. C.; that defendant company had employed a law firm to appear and look after the case, but the member of the firm who had been spoken to about the case, and who usually looked after cases of this character, had been compelled to leave and be absent from the State on account of sickness, and for that reason failed to appear at the trial, and, not having mentioned the case to his associate, the defendant was unrepresented at the trial and so lost its right to appeal; that the failure of the partner, in charge of the case, to attend the trial or inform his associate was due solely to his sickness; that at the following term of Superior Court this application was made on notice duly given, and having been continued from time to time till January Term aforesaid, the court entered judgment granting the writ of *recordari* and requiring the justice to send up the papers and that the cause be docketed for trial *de novo.* Thereupon plaintiff excepted and appealed.

T. C. Wooten, G. V. Cowper, and Y. T. Ormond for plaintiff.
Rouse & Land for defendant.

(505) HOKE, J. While it is held with us that, in proceedings of this nature, and in merely formal matters, such as the giving of notice, etc., a reviewing court is allowed a very wide discretion (*S. v. Johnston,* 109 N. C., 852; *R. R. v. Richardson,* 82 N. C., 343), our decisions also hold that an order granting a writ of *recordari* to a justice's court and directing that a cause be set down for trial *de novo* rests in the sound discretion of the court, and is one from which an appeal presently lies. Clark's Code Procedure (3 Ed.), sec. 545, citing among other cases, *Barnes v. Easton,* 98 N. C., 116; *Perry v. Whitaker,* 77 N. C., 102. Authority with us, too, seems to require that, in making an order of this

character, the judge should find and declare the facts upon which he bases his judgment. *Collins v. Collins,* 65 N. C., 135. But assuming that the court intended to adopt and approve the facts as contained in the affidavit of counsel, and that the facts contained therein make out a case of excusable neglect, we are of opinion that the order granting the writ in this instance is erroneous by reason of the utter failure to state or suggest facts showing or tending to show any meritorious defense to plaintiff's demand. This is sometimes dispensed with where the litigant has been misled by the action of the justice of the peace (*S. v. Warren,* 100 N. C., 489); but where, as in this case, the failure to appear was owing to the conduct of the party himself or his attorney, excusable or otherwise, it is essential to show or properly aver a meritorious defense before the action of the justice will be disturbed. *Pritchard v. Sanderson,* 92 N. C., 41; *S. v. Griffis,* 117 N. C., 714; *McKenzie v. Pitner,* 19 Texas, 135; *Chicago Stamping Co. v. Danly,* 85 Ill. App., 322.

As heretofore stated, there are no facts set forth in the affidavit submitted which show or tend to show that defendant had any valid defense to plaintiff's demand, and, on authority, in the absence of such showing, the order granting the writ was

Error.

(506)

FIRST NATIONAL BANK OF WILSON v. F. W. JOHNSTON AND BARNES & DICKINSON.

(Filed 12 March, 1913.)

1. Attachment—Principal and Agent—Principal and Surety—Judgment in Former Action—Payment—Property Subject to Levy.

A nonresident of this State sued a resident hereof in our courts upon a note secured by a chattel mortgage on personal property situated here, and in an attachment proceeding gave the required bond with an indemnity company as surety, and through its agents and attorneys, who also represented the surety, sold the mortgaged property. In that proceeding the defendant recovered damages to the value of the property thus sold against the plaintiff therein and his surety, which was paid by the latter. The present action is on a note made by the plaintiff and defendant in the first named action, and on attachment issued against the proceeds of sale of the property therein which had been paid into court: *Held,* upon the payment of the judgment for damages in the first named action, the title to the property seized passed from the estate of the original owner to the plaintiff in the claim and delivery proceedings, who is co-defendant here, and this seizure and sale having been at such defendant's suit and by his attorney's both in law and fact, the property should be considered his, subject to the rights of the present plaintiff under attachment levied, unless it is shown that the ownership has been altered or in some way affected.

2. Principal and Agent—Principal and Surety—Equitable Assignment—Evidence—Possession.

Under the circumstances in this case it is held that the agents or attorneys for the nonresident defendant hold the proceeds of the sale thereunder for such nonresident defendant, and not for the indemnity company, surety in the claim and delivery proceedings, and that nothing in the evidence tends to show a pledge or equitable assignment thereof by the agents to the surety, for such required the delivery of possession, or that it was held by the agent for the surety, and the paper-writing relied on for this purpose shows, at most, that the moneys were only to be retained by the agents within the jurisdiction of our courts.

3. Attachment—Custodia Legis—Property Subject to Levy.

The principle that property in *custodia legis* is not subject to a levy under an attachment does not prevail where the interest of an individual or litigant has been finally ascertained or declared to be his, and there is no writ or mandate or judgment of the court, in the claim and delivery proceedings, which requires its further retention.

(507) APPEAL from *Daniels, J.,* at November Term, 1912, of WILSON.

The action was to recover on a note for $2,500, subject to some credits executed by defendant F. W. Johnston and one James Mulligan, deceased, to plaintiff bank. Johnston being a nonresident, summons was duly served by publication as to him, and, on attachment issued in cause, same was levied on $2,500 held by Barnes & Dickinson, also made parties defendant. It was claimed by said defendants Barnes & Dickinson that they held said $2,500 as attorneys for the United States Fidelity and Casualty Company, a corporation that had gone on Johnston's bond in a certain claim and delivery proceeding by said Johnston against Mulligan. To determine this question, an issue was submitted to the jury as follows: "Did the defendants Barnes & Dickinson hold the funds received by them from the sale of the property seized in the case of *Johnston v. Mulligan's administrators,* in pledge, or otherwise, to idemnify the United States Fidelity and Guaranty Company upon the bonds executed by Johnston upon which the United States Fidelity and Guaranty Company was surety? Answer: No."

The court charged the jury that if they believed the evidence to answer the issue "No," and the jury so rendered their verdict. Thereupon the court gave judgment establishing an indebtedness of Johnston on the note at $2,125, with interest, and that the money seized by process and attachment to the extent required be applied in payment. Defendant excepted and appealed.

F. S. Spruill for plaintiff.

Barnes & Dickinson and Connor & Connor for defendants.

HOKE, J., after stating the case. It appeared in evidence that defendant Johnston, claiming to hold an unpaid note against one James Mulli-

gan, now deceased, with a chattel mortgage to secure same on a large amount of personal property, instituted claim and delivery for the property, and the same was seized and sold by advertisement, defendants Barnes & Dickinson being Johnston's attorney in the cause (508) and conducting the sales, and the money seized and held under attachment in the present suit being a part of the proceeds of said sales; that Barnes & Dickinson, at the time of suit instituted, were also agents of the United States Fidelity and Guaranty Company and acting for said company, and, after conferring fully with their principal, signed the replevy bonds in the claim and delivery proceedings. This last action coming on for trial, in due course it was established that the $12,000 note secured by the chattel mortgage had been paid, and the findings and facts admitted showing that the property seized had all been sold by Johnston or his attorneys to various persons throughout the community, an issue was submitted as to its value, and the same was fixed at $5,900, and judgment for said sum duly entered against said Johnston and the surety on the replevy bond, to wit, the Fidelity and Guaranty Company; that prior to said judgment, the present attachment was issued and levied on the proceeds from the sales of the personal property, under the mortgage, in the hands of Barnes & Dickinson, to the amount of $2,500, and on the rendition of said judgment Barnes & Dickinson applied the remainder of such proceeds on the above judgment, and the balance due on such judgment was paid by the indemnity company, satisfying the same in full. On the payment of the judgment for damages, the title to the property seized passed from the estate of Mulligan, the original owner, and its representatives (*Brickhouse v. Brickhouse,* 33 N. C., 404; *White v. Martin,* 1 *Porter,* 215; 28 A. & E. Enc., 738), and this seizure and sale having been made at the suit of Johnston and by his attorneys both in law and fact, Barnes & Dickinson, the property or its proceeds should be considered as Johnston's subject to the rights of plaintiff under the attachment, unless it is shown that the ownership has been altered or in some way affected. On careful perusal of the record, we find no facts, amounting to legal evidence, which tend to establish any such change. From the testimony of Mr. Dickinson, who seems to have dealt with both principals in perfect fairness and to have made a frank and satisfactory statement of the facts, this firm as stated, represented Johnston in the suit, and furthermore held a written power of attorney, under seal, from him (509) conferring ample authority to act for him in the premises, both in the suit and subsequent sale and disposition of the proceeds, and the only part of his testimony having any tendency to sustain a claim in behalf of the Fidelity Company is that when he writes to his principal as follows: "We would have hesitated to execute these two bonds for

F. W. Johnston if we had not been attorneys for him and thus in a position to protect the company. Each of these bonds simply guarantees to return property or its value, as the court may direct, and since the property will be sold next Monday, 9 August, as the inclosed notice will show, we expect to have the net proceeds of the sale put in the bank, where it will remain until the final judgment is rendered. Of course, we would not think of executing these bonds and then send the proceeds of the sale out of the State until it is determined in court which of the litigants is entitled to the money." The utmost that could be claimed here, in our view, was an agreement not to allow the money to leave the State; but there is no suggestion in this communication that the writer or his firm held the proceeds, while in the State, otherwise than for Johnston. It is urged that the facts should be held to make out a pledge in favor of the company or an equitable agreement to make one, but it is familiar learning that, to establish a pledge, there must be a delivery of the possession there (*McCoy v. Lassiter*, 95 N. C., 88), and in our view, there was neither such change shown in this statement nor any agreement to make one. Again, it is suggested that attachment would not lie, because the proceeds of this property should be considered and dealt with as in *custodia legis*. There are many cases which hold that property in *custodia legis* is not, under certain circumstances, liable to be levied on by attachment, but in this State the principle is not allowed to prevail where the interest of an individual or litigant has been ascertained or declared and is no longer required by the exigency of some court writ or mandate or decree. *Leroy v. Jacobosky,* 136 N. C., 458; *Gaither v. Ballew,* 49 N. C., 488; *Boylan v. Hines,* 13 L. R. N. (N. S.), 759.

In the case before us, the judgment awarding damages for the (510) property wrongfully seized has been fully satisfied. The title to the property or its proceeds are in the hands of Barnes & Dickinson, attorneys for F. W. Johnston, the plaintiff's debtor, or were at the time of the attachment levied; there is no writ or mandate or judgment of the court, in the claim and delivery proceedings, which requires its further retention, and we concur with his Honor in the ruling that on the evidence, if believed, it was subject to attachment issued in plaintiff's suit. There is

No error.

BONEY & HARPER MILLING COMPANY v. J. C. STEVENSON COMPANY.

(Filed 19 March, 1913.)

1. Pledgor and Pledgee—Pledge—Requisites—Possession.

For the pledge of personal property as security to the payment of a note to be effectual, it is necessary that the actual or implied possession be given to the pledgee.

2. Same—Commingling of Goods—Mortgages.

Where a written pledge of merchandise is given by a merchant for the payment of a note, and the pledgor retains the goods in his own warehouse, selling part of them from time to time and substituting like articles which have no distinctive marks of identification, it is not a sufficient segregation, and the property thus commingled cannot be sold by the pledgor in payment of the obligation, whether the written instrument be regarded as a mere pledge or a chattel mortgage.

3. Notes—Pledges—Collateral—Other Indebtedness.

A provision in a note that the collateral therewith deposited may be held by the bank to secure other indebtedness of the maker to the bank, due or to become due, is valid.

4. Notes—Pledges—Collaterals — Corporations — Receivers — Distribution of Assets—Unsecured Creditors.

Collateral deposited with a note given a bank by a corporation subsequently becoming insolvent and in a receiver's hands may be held by the bank until the note is paid, or sold by the bank, and the proceeds, if more than sufficient, should be paid over to the receiver; and the bank is then entitled to prorate with the other unsecured creditors of the corporation.

APPEAL by Home Savings Bank from *Carter, J.,* at January (511) Term, 1913, of NEW HANOVER.

Davis & Davis, Rountree & Carr, and K. O. Burgwyn for Receiver.
J. W. Little for Home Savings Bank.

CLARK, C. J. This is a creditors' bill in which T. W. Davis, Esq., was appointed receiver. The court approved the report and findings of the receiver, and there are two exceptions to the judgment of the court:

1. The Home Savings Bank held the Stevenson Company's note as follows:

WILMINGTON, N. C., 15 November, 1912.

We hereby assign to the Home Savings Bank as collateral for a loan of one thousand ($1,000) dollars, due 14 January, 1913, 750 cases No. 3 Standard Tomatoes, branded, some "Pride of Virginia" and some "Russell," paid for and stored in our warehouse at No. 11 Water Street, or

should sale of said tomatoes be made, the proceeds from the sale to be placed to the credit of note given the above mentioned bank for amount mentioned, with date of maturity expressed.

J. C. STEVENSON COMPANY,
Per JAS. M. STEVENSON.

The court approved the finding of the receiver that by verbal agreement between the Stevenson Company and the bank some of the goods mentioned in the pledge had been sold and the money used by the Stevenson Company and other goods substituted. And further, that there were no marks to identify any of the goods except a regular trade name or brand, and nothing to put creditors upon notice of said pledge, and that the goods were put in two piles in the store of the Stevenson Company, alongside of other goods piled in like manner; that the pledge was made in good faith, but that the bank never had the actual possession of the goods, which were at all times stored in the warehouse of the
(512) Stevenson Company. The judge found as additional facts that the goods so pledged were recognized at all times by both parties as pledged to the bank, and that there was an understanding between them that the goods could not be removed from the store of Stevenson Company without the bank's consent, except as permitted by the contract, and upon these findings of fact the court held that the pledge was invalid.

The finding of his Honor was correct, both because there was no delivery of the pledged property to the bank to be held by it as security, for "delivery is the essence of a pledge," says *Pearson, C. J.* (*Owens v. Kinsey,* 52 N. C., 246), and because the goods were intermingled with other goods and had no identifying marks upon them by which they could be distinguished from other goods of like nature belonging to the Stevenson Company.

It is true that as between the parties thereto a mortgage is good without registration. But the interesting question, whether when a receiver takes possession of property he holds it in like condition as the party himself, or whether he holds it as representative of the creditors, is not presented. But here there was no mortgage given, and this was not a sufficient segregation and identification of the property. Even if there had been a mortgage, it would have been invalid, as in *Blakely v. Patrick*, 67 N. C., 40, where a buggy maker executed a mortgage on ten new buggies without delivery of the possession, he having more than ten buggies on hand. In *McDaniel v. Allen,* 99 N. C., 135, where there was a release of three bales of cotton which were embraced in an agricultural lien, the Court held that no specific three bales of cotton having been identified, claim and delivery would not lie for the same.

2. The second assignment of error was upon the following ground: The Stevenson Company executed a note to the Home Savings Bank for $500, on the face of which, in pledging certain collaterals to secure payment thereof, there appear these words: "To secure the payment of this or any other obligation to said bank, due or to become due, we hereby pledge said bank or its assigns, holders of the same, the collaterals described on back, or herein inclosed." The bank held other indebtedness of the Stevenson Company besides this $500 note, to secure the payment of such other indebtedness. This point was fully discussed by *Walker, J.*, in *Norfleet v. Insurance Co.*, 160 N. C., (513) 327, and we need not repeat what was so well said there and which is sustained by the authorities cited in that case, that the collaterals can be held for any other indebtedness.

The receiver is not entitled to any securities in the hands of the appellant, the Home Savings Bank, until the bank has received full payment of its claims for $1,750 filed with the receiver. The bank is entitled to prorate with other creditors on the basis of $1,750, and then apply the proceeds of all collaterals in its hands to payment of the balance of its claim, unless the collaterals shall amount to more than the balance due. *Bank v. Flippen*, 158 N. C., 334, and cases cited.

The costs in this appeal will be divided.

Modified.

WALKER, J., did not sit.

R. S. BEST, ADMINISTRATOR OF R. R. BEST, v. CLARISSA BEST ET AL.

(Filed 26 March, 1913.)

1. Executors and Administrators—Petition for Sale of Lands—Assets—Demurrer—Appeal and Error.

Where an administrator petitions for the sale of lands to make assets to pay the debts of the deceased, and among these is a debt which the heirs at law contend is fraudulent, as to whether an appeal will lie from a judgment sustaining the plaintiff's demurrer to the answer, a sale of the land necessarily having been ordered so as to make assets, *Quære.*

2. Executors and Administrators—Petition for Sale of Lands—Assets—Heirs at Law—Pleas—Statute of Limitations—Judgments—Fraud.

The heirs at law of deceased person, whose administrator has petitioned for the sale of his lands to make assets to pay his debts, may, in protection of the real estate, plead the statute of limitations in the suit of a debtor whenever such plea would be available to the administrator (or executor) in protection of the personalty, except where the debtor's

claim is evidenced by a subsisting judgment against the administrator (or executor), the heirs at law are concluded as to its validity, unless the judgment can be successfully assailed on the ground of fraud and collusion.

3. Executors and Administrators—Judgment—Debt—Heirs at Law—Fraud—Pleadings.

Where the heirs at law of the deceased attack a judgment obtained against his administrator for fraud and collusion, which appears upon its face to be a valid subsisting judgment, it is not sufficient to allege in general terms that there has been fraud and collusion, for the facts constituting the alleged fraud must be stated with sufficient fullness and certainty to indicate the fraud charged and to apprise the offending party of what he will be called upon to answer.

4. Executors and Administrators—Final Settlement—Further Collection of Assets.

The powers and duties of an administrator do not necessarily cease because a final settlement had formally been made by him; and when he has not expressly been discharged from further execution of the trust, he still has the power, and may be under obligation, to continue to collect assets when the opportunity is further presented.

5. Same—Judgments—Fraud—Pleadings.

Where the heirs at law of a deceased person seek to set aside a judgment for fraud and collusion, obtained against his administrator, the allegations are insufficient which merely alleged that the administrator, having qualified for the purpose of furthering the collection of a debt due to his own father's estate, failed to plead the statute of limitations to the judgment obtained; that the administrator of the one to whose estate the debt was claimed to be due had made a final settlement without including this debt as an asset, and there is no suggestion that the original demand on which the judgment was rendered was not a just debt, and it is admitted it was never paid.

(514) APPEAL from *Justice, J.*, at January Term, 1913, of WAYNE.

Petition to sell land for assets, heard on transfer to civil-issue docket, on the pleadings, demurrer, etc.

Plaintiff, administrator of R. R. Best, filed petition to sell land of his intestate to make assets to satisfy unpaid claims against the estate, among others, a judgment rendered against said intestate in favor of

D. A. Cogdell, administrator of T. W. Best, the latter being (515) father of present plaintiff, before Hugh Humphrey, J. P., on 15 May, 1912. Other claims were set out in the petition which had been reduced to judgment. The defendants, the heirs at law of R. R. Best, answered, denying the validity of claims other than that of Cogdell, administrator, and, as to that, plead that at the time judgment was rendered in May, 1912, the same was long barred by the statute of limitations; that Cogdell had made final settlement of the estate of T. W.

Best, making no reference to or account of this claim, and that R. S. Best had qualified as administrator of his intestate, R. R. Best, with sole view of having this debt collected, and had suffered judgment to be taken without entering the plea of the statute of limitations and without notifying any of the heirs at law of R. R. Best, and that said judgment was procured by fraud and collusion between Cogdell, administrator of T. W. Best, and the present plaintiff, and defendants plead the statute of limitations to this claim and said fraud and collusion against enforcement of same by sale of the realty descended to them from their father, R. R. Best. Plaintiff having demurred to the answer as to this claim, there was judgment overruling demurrer, and plaintiff excepted and appealed.

W. C. Munroe and George E. Hood for plaintiff.
Langston & Allen for defendant.

HOKE, J. There is doubt if an appeal properly lies in the present condition of the record; a sale of the land, in any event, being necessary, having been ordered for the purpose of making assets. *Arrington v. Arrington,* 91 N. C., 301; *Commissioners v. Satchwell,* 88 N. C., 1; *Hines v. Hines,* 84 N. C., 122. Inasmuch, however, as the validity of all the other claims has been established and a decision on the Cogdell debt is required to a proper distribution of the assets we have deemed it best, for the purposes of this appeal, to treat the judgment as one in its nature final, and decide the questions which the parties desired to present. Recurring, then, to the pleadings, it is now very generally understood that on a petition to sell land for assets, the heirs, in protection of the real estate, may plead the statute of limitations whenever such plea would be available to the executor or administrator in protection of the personalty; but, when the claim is evidenced (516) by a subsisting judgment against the executor or administrator, the heir is concluded as to its validity, unless the judgment can be successfully assailed on the ground of "fraud and collusion," or "collusive fraud," as expressed in some of the cases. This position, as laid down in *Speer v. James,* 94 N. C., 417, correcting an erroneous impression to the contrary which had been made by *Bevers v. Park,* 88 N. C., 456, has been again and again affirmed by this Court, and may be taken as accepted law with us. *Lee v. McKoy,* 118 N. C., 518; *Byrd v. Byrd,* 117 N. C., 523; *Proctor v. Proctor,* 105 N. C., 222; *Smith v. Brown,* 99 N. C., 377. This, then, being the recognized principle, and the claim in favor of Cogdell having been reduced to judgment in 1912, before a justice of the peace, having jurisdiction, and being on its face a valid subsisting judgment, the same can only be successfully resisted by plea

and proof of fraud and collusion, vitiating the judgment, and, in order to such a defense, it is not sufficient to allege in general terms that there has been "fraud and collusion," but the facts constituting the alleged fraud must be stated and with sufficient "fullness and certainty to indicate the fraud charged and to apprise the offending party of what he will be called on to answer." *Mottu v. Davis,* 151 N. C., 237, citing *Ritchie v. McMullen,* 159 U. S., 239; 9 Eng. Pl. and Pr., 687.

In the present case, the only facts alleged tending to show fraud are that the administrator, having qualified for the purpose of furthering the collection of a debt due to his own father's estate, failed to plead the statute of limitations, and, second, that Cogdell, the father's administrator, had made final settlement and had not accounted for present claim as part of the assets; but neither of these averments, nor both together, without more, amount to "collusive fraud." *Byrd v. Byrd, supra.* It is nowhere suggested that the original demand, on which this judgment was rendered, was not a just debt, and it is admitted in the answer that the same has never been paid. The heirs of R. R. Best, the present defendants, had the first right, and were, no doubt, offered opportunity to qualify as his administrator, and, having failed
(517) to do it, the present plaintiff had *prima facie* the right to qualify to collect his father's debt, and neither the power nor the duties of Cogdell, as administrator of T. W. Best, had necessarily ceased because a final settlement had been formally made. Unless in terms discharged from further execution of his trust, he still had power and may have been under obligation to go on and collect assets when opportunity was further presented. 18 Cyc., p. 146. There was nothing in the facts set out, therefore, which amounted to a valid defense against the claim in question, and the further and general allegation of fraud and collusion did not amount to issuable matter.

On perusal of the pleadings, as they now appear, there was error in the judgment overruling plaintiff's demurrer.

Reversed.

Cited: Barnes v. Fort, 169 N. C., 434, 435.

W. W. STILLEY v. GOLDSBORO PLANING MILLS COMPANY.

(Filed 26 March, 1913.)

1. **Motions—New Trial—Newly Discovered Evidence—Superior Courts—Same Term—Practice.**

Passing upon a motion in the Superior Court to set aside a verdict as being against the weight of the evidence or for newly discovered testimony involves the recollection by the trial judge of the testimony, the demeanor of the witnesses, and other incidents of the trial, and as these are not so strongly impressed upon the memory of the judge that he may safely act after an adjournment, the motion must be made and determined at the same term at which the trial is had.

2. **Motions—New Trial—Newly Discovered Evidence—Supreme Court—Appeal and Error.**

In order for a party litigant to avail himself of newly discovered evidence in the Supreme Court, the case must be brought to that Court on appeal.

3. **Same—Practice.**

As to whether a defendant may avail himself of plaintiff's appeal to move the Supreme Court for a new trial on newly discovered evidence, *Quœre;* but in this case the Court has examined the evidence relied on by the defendant, and refuses the motion made thereon, and, following the practice of the Court in such instances, without discussion.

APPEAL from *Ferguson, J.,* at November Term, 1912, of (518) WAYNE.

Motion in above cause to set aside verdict and judgment and to grant a new trial upon the ground of newly discovered evidence. *Judge Ferguson* granted the motion and set aside the judgment. The plaintiff appealed.

W. T. Dortch, Langston & Allen, Winston & Biggs for plaintiff.
W. S. O'B. Robinson & Son for defendant.

BROWN, J. At October Term, 1912, of Wayne Superior Court plaintiff obtained judgment in a trial before *Ferguson, J.,* against defendant for damages on account of a personal injury. Defendant appealed, and was given sixty days within which to serve case on appeal. The case was never served and the appeal was abandoned.

At the same term of court the defendant, in the absence of counsel for the plaintiff, moved the court to strike out the judgment and set aside the verdict, "upon the ground of newly discovered testimony." This motion was continued by the trial judge, "at the suggestion of counsel for the defendant," to be heard at the November Term, 1912. Plaintiff had no notice of this motion, and as soon as it was brought to the attention of his attorneys they resisted it. At the succeeding term

of court, in November, *Judge Ferguson* heard this motion, and the plaintiff's attorney made a special appearance and resisted same, first, upon the ground that the court had no power to grant the motion at November Term; second, that the affidavits upon which the motion was based, of themselves, are not sufficient to sustain said motion. The judge was of opinion "that a new trial should be granted, on condition that the defendant corporation give a justified bond in the sum of $9,000 to pay any judgment which the plaintiff may recover of the defendant on a new trial, and upon the filing of said bond in ten days the judgment heretofore rendered in this case be canceled, the verdict set aside, and the case reinstated on the civil-issue docket for trial. In case (519) the aforesaid bond is not filed in said time, the verdict and judgment shall stand and execution issue thereon." The plaintiff excepted and appealed.

It is well settled under our practice that a motion to set aside a verdict and grant a new trial upon the ground of newly discovered evidence must be made and determined at the same term at which the trial is had.

It is likewise settled that when the new evidence is discovered during the trial term, but too late for the trial judge to hear a motion for a new trial at that term, such motion may be made in the Supreme Court, if the case is brought to that Court by appeal. *Turner v. Davis,* 132 N. C., 187; *Chisco v. Yow,* 153 N. C., 436; *Clothing Co. v. Bagley,* 147 N. C., 38.

The reasons why verdicts should not be set aside at subsequent terms, whether because against the weight of the evidence or for newly discovered testimony, is because hearing and determining such motions involve recollection by the trial judge of the testimony, the demeanor of the witnesses, and other incidents of the trial, which are not so strongly impressed upon the memory of a judge that he may safely act upon them after adjournment. *Knowles v. Savage,* 140 N. C., 374.

The defendant moves in this Court upon the hearing of this, the plaintiff's appeal, for a new trial upon the ground of newly discovered evidence.

It is contended that, inasmuch as the defendant abandoned its appeal, such motion ought not to be entertained upon the hearing of plaintiff's appeal from the order setting aside the verdict and judgment. However that may be, we deem it unnecessary to pass on the point, as we have of our volition examined the newly discovered evidence offered in support of the motion. It is our practice not to give our reasons for granting or refusing such motions, therefore we will not discuss the matter now.

The motion is denied.

The judgment of the Superior Court setting aside the verdict and judgment is reversed. The plaintiff is entitled to have the judgment signed and entered at October Term, 1912, duly docketed.

Error.

(520)

SAMUEL DUNIE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 March, 1913.)

1. **Evidence—Depositions—Commissions — Names of Witnesses — Harmless Error.**

Where in the same action two sets of depositions are taken of the same witnesses, and in one of the commissions issued therefor the witnesses are not named, and in the other they are named, and the evidence is substantially the same in both depositions, which are introduced at the trial, if any error was committed in permitting the depositions to be introduced under the commission not naming the witnesses it was rendered harmless by the introduction of the depositions taken under the other commission, naming them.

2. **Carriers of Goods—Bills of Lading—Indorsements of Shortage—Burden of Proof.**

In an action against the carrier to recover for a shortage of one box in the delivery of a shipment of two boxes of merchandise the plaintiff introduced in evidence the carrier's bill of lading, showing the delivery of the two boxes to the carrier, whereon the agent at destination had marked "one case short": *Held*, the agent's indorsement of the shortage was within the scope of his agency, and it was for the defendant to show, by the preponderance of the evidence, that the indorsement on the bill of lading was a mistake and that the case of goods marked short was actually delivered, when that defense is relied on.

3. **Same—Prima Facie Case—Charge Construed as a Whole—Harmless Error.**

In this action to recover of the carrier a case of merchandise, marked "short" on the bill of lading, the defendant contended that this indorsement was intended for another bill of lading and unintentionally made on the one covering the shipment in suit, which it had actually delivered to the plaintiff. The court charged the jury that this entry was an admission, *prima facie*, that one case was missing, which placed the burden on the defendant to show the contrary: *Held*, the words "*prima facie*" were inaptly used, but, taken in connection with the other relevant part of the charge, no reversible error is found.

APPEAL by defendant from *Webb, J.*, at September Term, 1912, of ROBESON.

Action, tried upon the following issues:

1. Were the goods sued for delivered to the defendant? Answer: Yes. (521)

2. If so, did the defendant deliver the goods sued for to the plaintiff? Answer: No.

3. In what amount, if anything, is the plaintiff entitled to recover from the defendant? Answer: $647.55
7.00

$654.55, with interest from 1 May, 1910.

The defendant appealed.

E. J. Britt, McIntyre, Lawrence & Proctor for plaintiff.
McLean, Varser & McLean for defendant.

BROWN, J. Defendant excepted to reading the depositions of certain witnesses because the names of the particular witnesses were not specified in the commission, although names of other witnesses were given.

Much space is given to discussion of this exception in briefs of counsel for plaintiff and defendant.

It appears that the depositions of the same witnesses were regularly taken the second time and both sets of depositions were introduced by plaintiff on the trial.

As the second set of depositions are practically identical with the first, we think the admission of the first set introduced entirely harmless. It is therefore unnecessary to discuss their regularity.

This was an action to recover the value of a case of clothing shipped to plaintiff at Mount Tabor, N. C., from Baltimore, Md. There were two cases of clothing in the shipment, one of which was safely delivered, but the other was not. Plaintiff proved the purchase of the goods, their value, delivery to defendant for transportation, and nondelivery at destination. Plaintiff also offered the freight bill for the two cases of clothing, marked upon its face by defendant's agent at destination "One case short." Defendant admitted receiving the goods, but alleged that it had made delivery to plaintiff. The agent explained his marking the
(522) freight bill "one case short" by saying he thought it was a bill for a case of whiskey that was short.

His Honor charged the jury: "Defendant, on the other hand, admits that one box or case addressed to Sam Dunie at Mount Tabor was missing and checked short, but defendant contends that it was a box or case of whiskey, and that it was not the goods claimed by the plaintiff. The court charges you, however, that as the agent of the defendant admits that he wrote the word 'short' upon the freight bill which called upon its face for two boxes of clothing weighing 1,249 pounds, that this is an admission, *prima facie*, on the part of the defendant that one of the cases of goods called for in said freight bill was in fact short.

or missing, and that the burden is therefore placed upon the defendant to show that the agent made a mistake and wrote the word 'short' on said freight bill unintentionally or thinking it was for another shipment."

We think his Honor rather inaptly used the words *"prima facie,"* but we do not regard it as at all injurious to defendant. The writing by the agent of the words "one case short" on the bill of lading handed to agent by plaintiff was an act within the agent's scope of duty, and is evidence against the defendant tending to prove that the case was never delivered to plaintiff. The charge of his Honor, that it put the burden on defendant to show that the agent made a mistake, was tantamount to telling the jury that the defendant must explain such entry.

The burden of proof of delivery of the goods, the receipt thereof being admitted, is cast by law on the defendant, and upon failure to satisfy the jury by the preponderance of evidence that the case of goods was delivered, the defendant is liable for its value.

We think the issue involved was entirely one of fact, and we find no substantial error in submitting it to the jury.

No error.

B. F. PENNY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 March, 1913.)

1. Negligence—Issues—Instructions—Former Opinion—Duty of Trial Judge—Appeal and Error.

In this case, on a former appeal, it was held by this Court that the only negligence which could be inferred from the evidence was that of defendant's conductor. Upon this appeal the evidence set out in the record is substantially the same as on the former trial, and the judge presiding submitted an issue, which was not answered by the jury, as to negligence, on the part of another of defendant's employees, its baggage master, concerning which it was formerly decided there was no evidence. By the language of the charge the judge confused the alleged negligence of the baggage master under the first issue with that of the conductor: *Held*, the submission of the second issue and confusing under the first issue principles of law relating to negligence on the part of the baggage master was reversible error, and that the trial judge should have followed the decision on the former appeal.

2. Judgments—Personal Injury—Interest Allowable—Discretion of Jury.

Interest on a judgment for damages for a personal injury from the time it is negligently caused is not allowable, even in the discretion of the jury. Interest runs from the time the judgment is rendered in such cases.

HOKE, J., concurring; CLARK, C. J., dissenting.

APPEAL from *Carter, J.*, at September Term, 1912, of NEW HANOVER.

These issues were submitted to the jury:

1. Was the defendant guilty of negligence in respect to the conduct of the conductor, Carmon, which was a proximate cause of the plaintiff's injury, as alleged in the complaint? Answer: Yes.

2. Was the defendant guilty of negligence in respect of the conduct of Van Amringe, the baggage master, which was a proximate cause of the plaintiff's injury, as alleged in the complaint? Answer: .....

3. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: No.

4. What damage, if any, is plaintiff entitled to recover? An-
(524) swer: Six thousand dollars, with 6 per cent interest from date of his injury.

From the judgment rendered, the defendant appealed.

E. K. Bryan, M. Bellamy, and A. J. Marshall for plaintiff.
George B. Elliott, George Rountree, and Davis & Davis for defendant.

BROWN, J. This case was before us at a former term, 153 N. C., 298, and the facts are fully stated in the opinion of the Court. It is unnecessary to restate them. The evidence set out in the present record is substantially the same as on the former trial.

His Honor saw fit to submit issues different from the usual issues in personal injury cases and different from those submitted on the former trial.

The submission of the second issue, relating to the conduct of Van Amringe, although unanswered, was calculated to mislead the jury and draw their attention to a matter which the opinion of this Court held not to bear on the liability of the defendant.

In the former opinion (153 N. C., 298), this Court specifically held that there was no evidence of negligence upon the part of Van Amringe, the baggage master; that there is no evidence that Van Amringe knew of or had reason to believe that LaMotte borrowed the pistol for an unlawful purpose. We held that "the act of Van Amringe in lending the pistol to LaMotte was not the proximate cause of the injury to plaintiff, which was caused by a stray bullet fired from Calloway's pistol." We further said: "There is, in legal parlance, no direct causal connection between the act of Van Amringe in loaning the pistol and the unforeseen accidental injury to plaintiff by Calloway."

We held then, and we hold now, that there is some evidence of negligence offered by plaintiff upon the part of the conductor, Carmon, which should be submitted to the jury, and therefore the motion to nonsuit was properly denied.

But there is no evidence that any other employee of defendant upon that train was guilty of negligence and could have pre- (525) vented the injury to plaintiff and failed to do it. The case is properly made to turn on the conduct of Carmon.

Nevertheless, and notwithstanding our former opinion, his Honor saw fit to charge the jury as follows: "If the jury find from the evidence, by its greater weight, that the employees of the defendant, *or either of them*, could by the exercise of the highest degree of practical care and human foresight, after they discovered a shooting was about to take place at its station, have prevented the plaintiff from being injured, even though the defendant's employees did not bring on the difficulty, and the jury shall further find that the failure to exercise such care and foresight was the proximate cause of the plaintiff's injury, then the jury should answer the first issue 'Yes.'"

The first issue properly confines the negligence upon which plaintiff's cause of action depends to the conduct of Carmon; yet his Honor, by inserting in his charge the words "or either of them" plainly permitted the jury to consider and pass on the conduct of Van Amringe and every other employee on the train, under that issue. This was in contradiction, not only of the former opinion of this Court, but at variance with the issue as submitted and formulated by the judge. This was error.

His Honor further charged that, "The plaintiff further contends that LaMotte was in the wrong, and the plaintiff contends that Van Amringe had no reasonable ground to believe that LaMotte was in the right; and the plaintiff contends that Van Amringe did not act with reasonable prudence in handing the pistol to an enraged man without knowing whether there was any occasion for him to have a pistol."

A considerable portion of his Honor's elaborate remarks to the jury relates to the alleged negligence of Van Amringe, and thus he injected into the case an element of negligence which we had held was foreign to it. This was highly injurious to defendant and was calculated to mislead the jury.

It is the duty of a trial judge to follow the decisions of the appellate court, especially when made in the cause he is trying, (526) whether he approves them or not.

His Honor instructed the jury that they could, if they saw fit, allow interest on the damages from the date of the accident, which occurred on 18 September, 1898. We are unable to find any authority in text-books or decided cases sustaining such ruling.

In reference to damages for personal injuries it has been uniformly and repeatedly held that the jury may not allow interest. It is different in respect to torts committed in the destruction of property, and for very good reasons. *Harper v. R. R., ante,* 451, and cases cited.

The Am. & Eng. Enc. states the rule to be that interest is not recoverable on the damages awarded in actions for torts to the person, because the damages in such cases are in large measure discretionary with the jury and are not ascertainable with reference to a pecuniary standard. Vol. 16, p. 1032, citing many cases from Maine, New York, Pennsylvania, Tennessee, Texas, Utah, Georgia, and other appellate courts. *R. R. v. Harmon,* 147 U. S., 571; *McMustry v. R. R.,* 84 Ky., 462; *R. R. v. Sharpe;* 91 Ky., 411. To the same effect is 22 Cyc., p. 1500.

The universal principle deduced from all the precedents is that a personal injury does not create a debt and does not become one until it is judicially ascertained, and that it is error for the court to tell the jury that they may allow interest on the damages awarded. We do not find a single dissenting case to that proposition. The following additional cases fully sustain it: *Sergeant v. Hampden,* 38 Me., 581; *Ratteree v. Chapman,* 79 Ga., 574; *R. R. v. Young,* 81 Ga., 397; *R. R. v. Wallace,* 14 L. R. A., 548, 90 Tenn., 53; *R. R. v. Carr,* 91 Tex., 332; *Costello v. District of Columbia,* 21 D. C., 508; *Ida v. R. R.,* 83 Vt., 66; *Jacobson v. Gypsum Co.,* 150 Ia., 330; *Cochran v. Boston,* 211 Mass., 171; *R. R. v. Read,* 37 Ill., 484.

(527) In *Cochran v. Boston, supra,* the latest case on the subject, it is said that interest may not be considered in determining the amount of damages for personal injury, and the reason for the rule is clearly and forcibly stated as follows:

"The rule in substance adopted in these cases is that, while interest is not allowed as matter of right, the time for which the plaintiff has been kept out of the use of his property or the damage occasioned by the wrong of the defendant may be considered and an amount not exceeding the legal rate of interest may be included therefor in the verdict if necessary in order to give adequate compensation. This principle is applicable to cases where there has been a definite injury to specific property. The reason is that stated by *Chief Justice Shaw,* in *Parks v. Boston,* 15 Pick., 198, in laying down the rule for the computation of interest where property is taken by eminent domain. The injury occurs and is finished in its results on a particular day and can then best be ascertained, and exact justice would be done by a contemporaneous determination of the loss. An action for personal injuries is essentially different in its nature. The damages are not complete and ended on the day of the accident, but continue for a greater or less period thereafter.

"The extent and magnitude of the injury are not infrequently unappreciated and incapable of reasonable ascertainment on the day it is received. Its degree of permanence is often deceptive at the first, and commonly the determination of conditions requisite for recovery is materially assisted by the perspective of time. The most helpful aid

in learning the nature and degree of actual injury may be events occurring after the event complained of. There is no fixed standard by which the compensation to be awarded can be measured. Its general rules have been stated many times. The sum of money fixed upon must be such as fairly compensates the injured person for the loss of time, the physical pain, and the mental suffering, both that undergone in the past and likely to occur in the future, and also money reasonably expended and to be expended in assuaging pain and in restoration to health. Elements that are past and also those which are to come must be considered. Most of them are not capable of mathe- (528) matical computation. They can be settled only by the sound judgment and conscience of the tribunal by which they are assessed, and they are peculiarly within its province. The damages are to be determined, moreover, as of the day of the trial. It is apparent that interest or considerations akin to interest have no place in an inquiry of this sort. Interest is compensation for the use of money which is due. But the money which the wrongdoer is required by law to pay for the future suffering, expense, or loss of time of one whom he has injured is not due until judgment is made up. It is not a debt and does not become a definite obligation until a verdict or finding has been finally entered. It is composed of divers elements, together making up a gross sum, many of which may not have sprung into being on the day when the tort was committed, although directly traceable to it as a cause. If interest were properly chargeable on that which has already accrued, discount should be allowed upon that which relates to the future. Such a method of computing damages would be wholly impracticable. The amount of damages recoverable in actions of this sort, as well as those under certain branches of the employers' liability act and under penal statutes for causing death, is limited to definite amounts. Plainly, no interest can be allowed in instances of maximum injury."

See, also, 3 Sedgwick Dam. (8 Ed.), sec. 481 *et seq.*, and cases cited.

In a very able and elaborate opinion referring to the rule of damage in personal injury cases, the Supreme Court of Tennessee says:

"As this sum in gross includes all the compensation which is requisite to recover for pain, suffering, and disability to date of judgment and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks (529) to continuing suffering and disability, just as, when given late,

it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before."

In *R. R. v. Young,* 81 Ga., 397, the Supreme Court of Georgia, in a forcible opinion by *Chief Justice Blackley,* says:

"To add interest in discretionary damages is to multiply uncertainty by certainty; the indefinite by the definite; a mixture of incongruous elements which subjects one of the parties to the burden and gives the other the benefit of both kinds. If the time of realizing discretionary damages is to be considered, it should be left as one of the terms of the general problem of damages, unfixed like all the rest of the terms. The rate of interest, as established by law, has no relevancy to the matter. Sums ascertainable only by the enlightened conscience of impartial jurors do not bear interest before verdict, either as interest or as damages, with or without discretionary allowance by the jury."

It is unnecessary to discuss the other assignments of error, as there must be another trial, and the errors complained of may not occur again.

New trial.

HOKE, J., concurring: I think there should be a new trial of the cause by reason of misdirection of the court on the first issue. His Honor, being in doubt as to how far the former rulings of the Court were an estoppel in the present trial, and with a view of developing the entire facts, in the laudable endeavor, no doubt, to make an end of a protracted litigation, submitted the question of defendant's responsibility on two issues, one having reference to the conduct of Carmon, the conductor, and the second to that of Van Amringe, the baggage master. In charging the jury on the first issue, that referring to Carmon, he permitted the jury to consider the conduct of any other employee on defendant's train, which would include the conduct of Van Amringe,
(530) and we are, therefore, unable to determine in what aspect of the evidence the responsibility has been fixed on defendant nor what exceptions are open to defendant on the record; and this position, too, is in contravention of the former opinion in the cause. This was, no doubt, an inadvertence on the part of his Honor, but it has operated to defendant's prejudice to a degree that, to my mind, constitutes and should be held for reversible error. The authorities, too, favor the position that in actions for personal injuries interest is not a proper element of damages to be allowed.

CLARK, C. J., dissenting: This action began in 1898, and has been pending fifteen years. In that time the plaintiff has recovered four several verdicts; forty-eight jurymen have unanimously decided in his

favor and four Superior Court judges, who heard the evidence, and who understood the surrounding circumstances attendant upon the trials, have approved their verdicts. There ought now, in all justice, to be an end of this litigation.

It is more than doubtful if the objections which have been found by this Court as to these several trials had been avoided whether the juries would not have returned exactly the same verdicts. In some jurisdictions, whether by constitutional provision or by legislative enactment, it is now forbidden the appellate court to grant more than one new trial. This rule will certainly be more conducive to justice than the present system, as illustrated by a new trial for the fourth time.

After so many verdicts in his favor, and against so powerful and influential an opponent, it would be well to disregard mere technical incorrectness in the charge, or other technical errors in the admission of evidence, since some of these can always be found, as the history of this case shows, in all long trials where a cause is hotly contested. It seems to me that justice requires that technicalities should now be disregarded and that in the interest of justice, after four verdicts in his favor and after fifteen years of litigation, the plaintiff should be allowed to rest upon his hard-earned victory.

The jury might have estimated the damages as of the time of the injury, have added fifteen years interest and returned a lump (531) sum as their verdict. It would have been better if they had done this. But it ought not to be held for error that the jury showed us the workings of their minds and stated their estimate of the injury at the time of its occurrence and directed that interest from that time to the date when the plaintiff should receive his compensation should be added.

In my opinion, the judgment should be affirmed.

VIRGINIA AND CAROLINA SOUTHERN RAILROAD COMPANY v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 2 April, 1913.)

1. Railroads— Condemnation—Crossing Other Railroads—Sidings—Interpretation of Statutes.

Where a railroad company is given by its charter the right to build its road, acquire rights of way by condemnation, etc., to intersect any other railroad upon the grounds thereof; to build sidings, switches, sidetracks, etc., and in making intersections with other railroads to have all the rights and privileges conferred upon railroads of this State, it is given authority, both by its charter and Revisal, 2556 (5) and (6), to

condemn and acquire a right of way across the road of another company in order to construct a siding to manufacturing plants or other business enterprises for the handling of their freight. *Butler v. Tobacco Co.*, 152 N. C., 416, distinguished.

2. **Same—Mutual Consideration—Change of Crossing—Assessing Damages—Findings of Court—Questions for Jury.**

A railroad company having the power of condemnation across the road of another company should exercise this right with due regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience; and it appearing in this case that the defendant had a spur track or siding where the plaintiff company proposed to cross it, and that the plaintiff may reasonably be required to cross at a point beyond the end of the defendant's spur, it is *Held* that the trial court, in a reconsideration of this case, will adjudge as to the feasibility of the suggested alteration of the plaintiff's route, and call in the aid of the jury if necessary, any additional cost to the plaintiff to be considered in diminution of the defendant's damages.

3. **Railroads—Condemnation—Crossing Other Roads—Immaterial Matters—Competition—State Policy.**

Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants or business places, for a side spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. *Semble*, it is the policy of the State to encourage competition among common carriers for the advantage of the public.

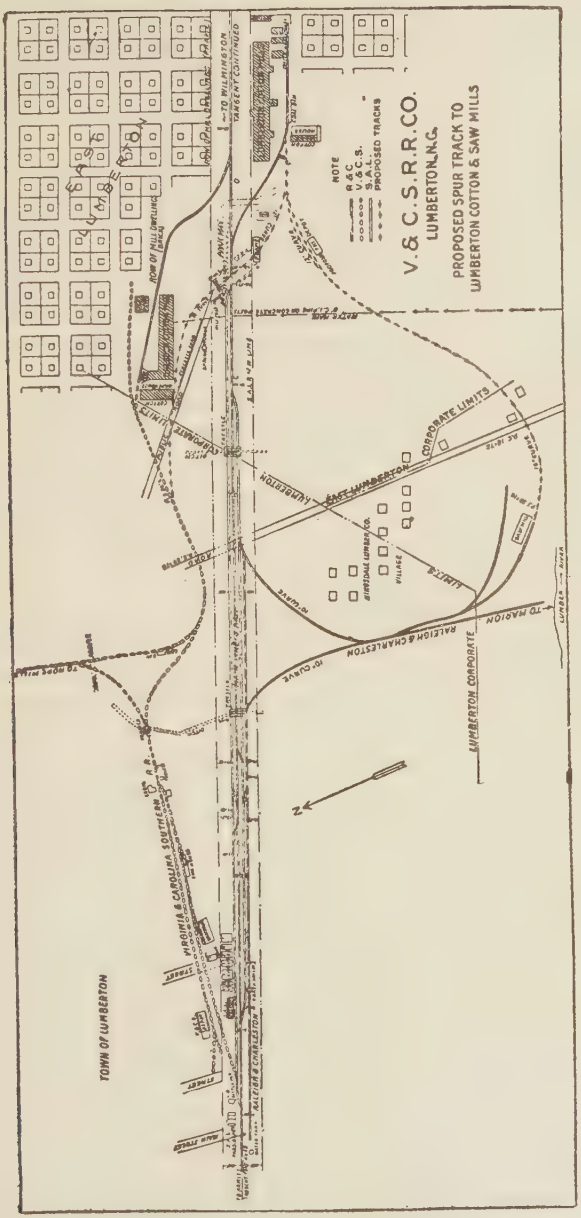
HOKE, J., dissenting.

(532) APPEAL by plaintiff from *Peebles, J.*, at May Term, 1912, of ROBESON.

McLean, Varser & McLean for plaintiff.
John D. Shaw and McIntyre, Lawrence & Proctor for defendant.

CLARK, C. J. This is a proceeding by the plaintiff to condemn a right of way across the track of the defendant in order to extend its track to the Lumberton Cotton Mills and the Kingsdale Lumber Company plants on the south side of the defendant's track and to make connection with the Raleigh and Charleston Railroad Company's track.

The plaintiff has a spur track at Lumberton extending over some 600 yards to the Dresden Cotton Mills on the north side of defendant's track, and it wishes to extend it further to the two plants above named on the south side of defendant's track, and to make connection on that side with another railroad, as above stated. The petition was granted before the clerk, and on appeal before *Cooke, J.*, an injunction was


V. & C. S. R. R. CO.
LUMBERTON, N. C.
PROPOSED SPUR TRACK TO
LUMBERTON COTTON & SAW MILLS
NOTE
R.&C.
V.&C.S.
S.A.L.
PROPOSED TRACKS
TO WILMINGTON
TANGENT CONTINUED
CORPORATE LIMITS
EAST LUMBERTON
RALEIGH & CHARLESTON
TO MAXTON
LUMBERTON CORPORATE
TOWN OF LUMBERTON
VIRGINIA & CAROLINA SOUTHERN
MAIN STREET

refused, and the commissioners proceeded to make the condemnation, who assessed defendant's damags at $600. On the hearing before *Peebles, J.*, on exceptions filed, the jury assessed the damages (534) which the defendant was entitled to recover from the plaintiff at $300, but the judge reversed the order of the clerk and rendered judgment against the plaintiff.

The defendant has itself a spur track to both these plants and the Raleigh and Charleston Railroad has also a spur track to the Kingsdale Lumber Company plant. There is no reason why the plaintiff is not entitled to the same privileges, unless under the general law, or under its charter, it does not have the same power in this respect which has been granted to the other two railroads. Indeed, the defendant's brief frankly says that notwithstanding the voluminous record, "only one question is really presented," and that is whether the plaintiff has a right to build a spur track across the defendant's line "to reach a cotton mill and lumber company, to the end that it may secure the freights therefrom." The real contest is thus frankly presented, which is whether the plaintiff can interfere with the monopoly of the business from those plants.

The defendant strongly urges that the plaintiff did not need this privilege, because the defendant would do the shifting of plaintiff's cars over its own tracks to those points at so reasonable a rate that the plaintiff did not need to build its own track for that purpose. The plaintiff replied that the defendant had been charging most exorbitantly for such service, and in view of this litigation it had reduced its rates, but that it was delaying the plaintiff's cars, on one excuse or another, so as to practically deprive it of the privilege, and that if it was denied the right to build its tracks that the defendant would then again raise its charges as to all interstate cars, which was the bulk of the business, and that no relief could be had. The defendant, of course, denied any intention to do this. We cannot consider such arguments. The only proposition before us is as to whether the plaintiff has a right to build to those points, and if so, whether it is a wise expenditure for it to build such tracks is a matter for the consideration of the plaintiff alone, and not for the courts. As a matter of public policy, the State encourages competition among common carriers so that the public may have the resulting benefits: *Industrial Siding Case,* 140 N. C., 239; *R. R.* (535) *Connection Case,* 137 N. C., 71, which hold that a "railroad is created to subserve primarily the public good and convenience." But we put our decision herein upon the wording of the statutes in determining whether the power claimed by the plaintiff is conferred.

There is no question as to the right of way, except across the defendant's track, for the plaintiff has acquired the right of way entire except

at that point. Neither is there any question as to the consent of the city authorities of East Lumberton, for their ordinance granting the right of way through said town, which lies on both sides of defendant's track, was tendered, but was refused by the judge upon the ground that the sole question was whether the plaintiff had the power, under the statute, to extend its track to the two plants in question, for if it had, the power to condemn across the defendant's track was a necessary incident.

Private Laws 1903, chap. 233, sec. 2, as amended by Private Laws 1907, chap. 269, confers upon the plaintiff the right to "construct, maintain, or operate a railroad with one or more tracks from the town of Lumberton to some point on the main line of the Atlantic Coast Line," and "also from any point on its main or branch lines to any point within the State of North Carolina." It is also therein given the power "to connect its tracks with any other railroad and to lay down and use tracks through any town or city along its proposed lines with the consent of the corporate authorities thereof."

The plaintiff also has the power under section 10, chapter 233, Private Laws 1903, "to cross at grade, or over or under, any other railroad constructed or that may hereafter be constructed at any point on its road, and to *intersect, join,* or *unite its line* of railroad with any other railroad upon the grounds of such other companies, at any point on its route, and to build turnouts, sidings, switches, side-tracks or *any other conveniences in furtherance of its objects of construction,* and may in making intersection or connection with any other railroad have all the rights and privileges conferred upon railroads by the laws of this State."

Section 11, chapter 233, Laws 1903, as amended by Private Laws 1907, chap. 269, further provides: "Whenever, for any (536) cause, this company is unable to agree with the owners of the lands, or *any railroad owning any right of way,* or any town or city owning any street or public way *over* or near which it purposes to extend its road for the purchase of such lands for its depots, roadbeds, quarries, or *other purposes* of the company, the said company may file a petition before the clerk of the Superior Court," etc.

The general act, Revisal, 2556 (5) and (6), confers on every railroad the power "to construct its road along or upon any stream of water, street, highway, turnpike, *railroad, or canal* which the route of its road shall *intersect* or touch."

"*To cross, intersect, join, and unite its railroad* with any other railroad before constructed at any point on its route and upon the grounds of such other company, with the necessary turnouts, *sidings, and switches and other conveniences in furtherance of the object of its construction.* And every company whose railroad is or shall be hereafter intersected

by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as provided in this section in respect to acquiring title to real estate."

It seems clear, therefore, that the plaintiff had a right to extend its line southward to any distance or to any point it saw fit, and in so doing to cross the track of the defendant. It also has the right, both under the general law and under its charter, to extend its track to the plant of the Lumberton Cotton Mills and to the Kingsdale Lumber Company plant, and to make connection near by with the Raleigh and Charleston Railroad Company. It has already acquired the rights of way for that purpose and has the permission of the corporate authorities of East Lumberton for that purpose. The right to cross the track of the intervening line of the defendant is also expressly conferred by the
(537) statute, and is a well-settled proposition of law. *R. R. v. R. R.*, 83 N. C., 489; *R. R. v. R. R.*, 104 N. C., 665; *Lumber Co. v. Hines*, 127 N. C., 132.

As the defendant itself has built tracks for all three of these purposes, it is clear that the plaintiff has exactly the same rights and power under the general law, and being, besides, expressly conferred under the provisions of its charter above set out. *Butler v. Tobacco Co.*, 152 N. C., 416, relied upon by the defendant, is no wise in point. In that case the railroad company had its track in the middle of the street. It sought to lay down another and parallel track in the same street "off its right of way," using for part of the way even the sidewalk. This Court held that the property-owners could not be deprived of the use of the street by an unauthorized license by the town authorities to the railroad to build this side-track "off its right of way," in order to facilitate the railroad taking freight from an industrial plant. In this case there is no attempt to appropriate a public street for the use of a common carrier and for the benefit of an industrial plant to the inconvenience of the public.

The defendant urges that it will be a great inconvenience to it for the plaintiff to condemn a right of way across its track at a point where it has a siding, and thus interfere with the use of that siding for shifting and for placing box cars. The plaintiff replies that the defendant has only recently extended its side-track to that point and for the purpose of creating this grievance. However that may be, an examination of the map shows that less than 100 yards east of the point where the plaintiff seeks to cross the defendant's track the defendant's side-track

ends and a public road crosses the defendant's track at that point. There is no reason, so far as this evidence shows, why the plaintiff cannot extend its tracks on the north side of the defendant's track before crossing, and condemn a right of way just beyond the end of defendant's side-track near the point where the public road now crosses. While the plaintiff has a right, both under its charter and the general law, to condemn a right of way across the defendant's track, this right should be exercised with due regard to the convenience of both parties and with as little interference with the defendant's use of its tracks as can be obtained without a great increase in the cost and in- (538) convenience to the plaintiff. We do not see that a requirement that the plaintiff should cross at the point herein suggested will add at all to the length of the plaintiff's proposed extension of its track nor to the cost thereof. If it should, this matter can be considered by the judge and jury in the assessment of damages for crossing at said point. His Honor, in consideration of the case, when it goes back, will adjudge as to the feasibility of the suggested alteration in the route of the proposed extension of plaintiff's tracks, calling in the aid of a jury, if necessary.

We need not consider the numerous other exceptions made in this case, for, as his Honor held and the briefs for both parties admit, there is but a single point upon which all other matters depend, and that is the one which we have discussed, as to the right conferred by statute upon the plaintiff to extend its tracks for the purposes above named.

The ruling of the court below must be set aside, and the cause will be proceeded in as indicated in this opinion.

Reversed.

HOKE, J., dissents.

JOEL K. MINTZ v. J. E. RUSS AND WIFE.

(Filed 2 April, 1913.)

1. Deeds and Conveyances — Registration — Title—Possession—Evidence — Nonsuit—Interpretation of Statutes.

Where in an action to recover lands it appears that the *locus in quo* was included in the plaintiff's deed made prior to the deed under which the defendant claims, which latter deed also included the lands in dispute, and was registered first, and from plaintiff's own evidence he had never been in actual possession of the lands in dispute; and it appears that it had been lived on and cultivated by the defendant and those under whom he claimed for a period of many years, both parties claiming under a common source of title, it is *Held*, that defendant's deed, being first reg-

istered, gave him the superior title (Revisal, sec. 980); and there being no evidence of plaintiff's possession on the lappage, Revisal, sec. 383, does not apply.

2. Deeds and Conveyances—Boundaries—Lappage—Constructive Possession—Color of Title—Actual Possession.

The principles obtaining which allow the one in possession under a deed claimed as color of title to show constructive possession to the outside boundaries of the deed, including a lappage of lands embracing the *locus in quo*, do not apply where there is adverse occupation of the lands contained in the lappage in the other party to the controversy, and the party claiming under "color" has never exercised any control over the lands amounting to acts of ownership or possession.

APPEAL from *Bragaw, J.*, at September Special Term, 1912, (539) of BRUNSWICK.

Action of ejectment. At close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

C. Ed. Taylor for plaintiff.
Cranmer & Davis for defendants.

HOKE, J. Plaintiff introduced a deed from McDowell Russ to Dexter Russ, dated 17 January, 1876, registered March, 1910; a deed or binding contract covering same land from Dexter Russ to plaintiff, dated in 1880, registered October, 1907. Plaintiff further introduced deed from McDowell Russ to defendant, dated January, 1905, registered February, 1908, and, as we understand the record, the evidence on the part of plaintiff tends to show that the *locus in quo* lies on the east of the Fork and Starboard Road and same is included within the lines of plaintiff's deed; that plaintiff's house is on this land, but west of said road, and plaintiff has lived there or occupied it by his tenants continuously from or about the time of the date of the deed in 1877, under which plaintiff claims, but that he has never at any time occupied or "exercised any possession" of the portion of his boundary lying east of the said road; that defendant had entered on the land east of the road, being the *locus in quo*, about 25 acres, and had built his house and occupied same since his entry in 1890, and, in January, 1905, his father, McDowell Russ, made defendant a deed and same was duly (540) registered in February, 1908; that prior to defendant's entry his father, McDowell, had exercised possession and control of the land, asserting ownership of the land lying east of the road, and his widow's home house being also on that side. Upon this, the evidence chiefly relevant, we are of opinion that the judgment of nonsuit should be sustained. The defendant's deed from the common source of title

having been first registered, he has the superior legal claim (*Combes v. Adams,* 150 N. C., 64; Revisal, sec. 980), and there is not only no testimony *tending* to affect this position by reason of adverse possession on the part of plaintiff, but his own evidence tends to show that he has not been seized or possessed of the land at any time within twenty years next before action brought. *Houston v. Smith,* 88 N. C., 312; Revisal, sec. 383. True, as plaintiff contends, when one enters on a tract of land, asserting ownership, under a deed having definite lines and boundaries, such occupation and the effect of it will ordinarily be extended to the outside boundaries of his deed, but this principle is only allowed to prevail when and to the extent that there is no adverse occupation of the lappage in another. *Stewart v. McCormick, post,* 625; *Simmons v. Box Co.,* 153 N. C., 257. In the present case, there has been adverse possession of the lappage, apparently from the time that plaintiff took his original bond for title from Dexter Russ in 1877, and, according to his own statement, plaintiff was never "worked or exercised any possession east of the Fork and Starboard Road," and in the sales he has made of portions of the land he has always stopped at the road as his eastern boundary.

There is no error, and the judgment of nonsuit is

Affirmed.

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(541)

A. M. LEE v. CLAYTON GILES.

(Filed 2 April, 1913.)

1. Wills—Devises—Widow's Dissent—Dower—Creditors—Interpretation of Statutes.

Where a widow, a devisee and executrix under her husband's will, does not dissent from the will within the period of time required by the law, and has qualified and acted as executrix for seventeen months, and then files her dissent and claims her dower interest, which is set apart to her, the effect of her act at that time, if the lands devised do not exceed the quantity she would be entitled to by right of dower, is to secure to her the lands devised free from the claims of creditors of the estate during her natural life (Revisal, sec. 3082); and thus taking under the will, the decree for dower does not in strictness confer any other estate on her.

2. Same—Deeds and Conveyances—Mortgages—Interests in Lands.

Where a widow is executrix and devisee under her husband's will, and brings proceedings for the allotment of her dower after the statutory period allowed therefor, the effect of her allotment does not in form or

effect amount to a dissent from the will nor to any renunciation of the devisee's estate under it; and where she has executed a mortgage thereon to secure money borrowed by her, her mortgage carris to the mortgagee as security for her debt the entire estate, subject to th rights of crditors as they may exist.

3. Wills — Devises — Mortgages — Notice to Creditors — Interpretation of Statutes.

Where a widow, a devisee under her husband's will, has executed a mortgage on the lands devised more than two years, to wit, five years, etc., after the death of the testator, the mortgage is effective against creditors if taken in good faith and without notice of the insolvency of testator's estate.

4. Same—Dower—Possession—Constructive Notice.

Where the widow and devisee of her husband has her dower interest in his lands set apart for her after the period of time allowed therefor by statute, and subsequently mortgages the land devised and allotted to her, being in possession thereof, the proceedings for dower, based on a petition containing allegations of insolvency, is not constructive notice to the mortgagee of the insolvency of the testator's estate; and he has a right to assume that the mortgagor, being in possession and holding the lands under the devise, more than two years after the testator's death, without any proceedings of record brought by creditors of the estate, or judgments against it, is the sole owner and had the right to convey the lands thus held. The application of this doctrine of constructive notice, in this case, is not affected by an heir at law joining in the execution of the mortgage.

5. Wills—Devises—Creditors' Bill—Lis Pendens—Mortgages—Foreclosure—Sales—Purchasers.

Where a devisee of lands has mortgaged them, and thereafter a creditors' bill is brought to subject the lands, if necessary, to debts due by the deceased, making the devisee a party, the suit amounts to notice to all interested parties as a *lis pendens*, and where a sale of the lands is decreed, the purchaser thereat acquires the equity of redemption, which the devisee has held subject to the testator's debts; and where, subject to this notice of *lis pendens*, a foreclosure sale has been decreed, without making the creditors parties, and the land has been purchased by the mortgagee, he and those claiming under him are entitled to their mortgage lien on the lands, and are held accountable for the rents and profits during the time of their possession; for, being purchasers with constructive notice of the creditors' rights, the foreclosure sale is invalid as to them.

ALLEN and WALKER, JJ., did not sit on the hearing of this case.

APPEAL from *Carter, J.*, at August Term, 1912, of SAMPSON.

(542) Action to recover possession of a house and lot in Clinton, N. C., and for other relief. On the trial it was properly made to appear:

1. That Judge A. A. McCoy died resident in said county on 11 November, 1885, owning and possessed of certain real estate, including the house and lot in question, and leaving a last will and testament in which his widow, L. A. McCoy, was made the sole devisee of all his property, both real and personal, and containing provision that if she married again she was to share equally with such of his children as should be living at that time, and the widow was also appointed as executrix. At the time of Judge McCoy's death, he had one child, H. A. McCoy, who is still living, and grandchild by his daughter, Mrs. Griggs.

2. That on 13 November, 1885, the widow qualified as executrix of the will and entered on the administration of the estate and on 20 April, 1887, becoming apprehensive that the debts would absorb the estate, under statute now Revisal, sec. 3082, she filed a petition (543) for dower in the Superior Court of the county, and same was allotted in the house and lot, the subject of present suit.

3. On 8 December, 1890, Mrs. L. A. McCoy executed to Mrs. Ellen Giles, of Wilmington, North Carolina, a mortgage on the property to secure the sum of $1,300, money borrowed. The son, Thomas A. McCoy, joined in the said mortgage deed, but the grandchild, A. L. Griggs, did not join. At that time no judgment had been docketed against the estate. An action to foreclose this mortgage was brought to the February Term, 1897 (record, p. 56), and judgment of foreclosure entered at April Term, 1897, in which W. K. Pigford was appointed commissioner to make sale of the land under the mortgage, and said commissioner sold same, and Ellen B. Giles, the mortgagee, brought it on 6 December, 1897, and deed was made her on 21 February, 1898. (Record, p. 63.) Ellen B. Giles, the purchaser, entered into possession of said dower lands immediately under her said deed, and she and the defendant remained in possession until the death of Mrs. L. A. McCoy, in June, 1910. Mrs. Ellen B. Giles died 22 September, 1908, without issue, and left a will devising this McCoy property to a kinsman, the defendant, Clayton Giles, who continued to hold possession of the said property after the death of the widow, L. A. McCoy, in June, 1910, and the plaintiff brought this suit to recover possession of same.

4. On 22 April, 1892, plaintiff instituted a general creditors' bill against the said executrix, and on 25 January, 1895, Thomas H. McCoy and A. McCoy Griggs were duly made parties defendant, being the only heirs at law. (Record, pp. 27 to 31.) This suit was to have accounting of estate and to enforce payment of debts by sale, if necessary, of all the realty devised by the will of A. A. McCoy, and the same went to judgment, and was appealed to the Supreme Court, and is reported

as *Lee v. McCoy,* 118 N. C., 518. Upon the opinion being certified down, the Superior Court rendered final judgment thereon at the February Term, 1897, by his Honor, *Judge McIver,* condemning the land in controversy, to wit, the said house and lot in Clinton, to be sold to
(544) pay the debts of plaintiff and other creditors, and this judgment is rendered against the widow, L. A. McCoy, executrix, and the widow, L. A. McCoy, individually, and the two heirs at law. (Record, p. 37.) T. M. Lee was appointed, in the judgment, commissioner to sell the land, and sold same, and the plaintiff, A. M. Lee, purchased same at said sale, as trustee for himself and other creditors, and a deed by said commissioner was made to him. (Record, p. 40.) The first tract in said deed was the tract assigned the widow as dower, and is the land in dispute.

On the admissions and facts in evidence, the court below held, in effect, that the petition for dower amounted to a dissent from the will of the husband, restoring the legal title of his realty to his children and heirs at law, subject to the dower interest allotted, to wit, in the house and lot, the subject in controversy; that Mrs. Giles, as to her mortgage interest, was a purchaser for value without notice as to one-half the property, to wit, the share of Mrs. H. A. McCoy, and that present defendant, as her representative and devisee, was entitled to collect same. That defendant's claim, under the mortgage, was subject to credits, the value of the life estate or dower interest at the time Mrs. Giles, the mortgagee, purchased and entered into possession of the property, and subject also to the annual rental value from the time of the death of Mrs. McCoy to day of present and final adjustment. Pursuant to this opinion and under the charge of the court, the following verdict was rendered:

1. Is the plaintiff the owner of and entitled to the immediate possession of the lands described in the complaint? Answer: Yes; subject, however, to an undivided one-half interest therein to the payment of such sum, if any, upon a full accounting, as may be found due to the defendant on the mortgage referred to in the pleadings.

2. Is the defendant in the wrongful possession of the same? Answer: Yes; since the death of L. A. McCoy, 10 June, 1910.

3. What is the annual rental value of said land? Answer: $100.

There was judgment that plaintiff was owner and entitled to
(545) possession of same; that defendant's mortgage was subsisting and unforeclosed as to the interest of Thomas H. McCoy, and that this claim and lien was subject to the credits; that plaintiffs had the privilege of paying off the amount due, if any found, and if not, claim to be enforced by sale, etc. From which judgment both plaintiff and defendants appealed.

G. E. Butler and John D. Kerr for plaintiff.
Faison & Wright and H. A. Grady for defendant.

HOKE, J., after stating the case: Our statute, Revisal, sec. 3082 (Code, 83, secs. 2114-2115), provides that the dower or right of dower of a widow in such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subjected to the payment of debts due from the estate of her husband during the term of her life, etc. In the present instance the widow did not dissent from her husband's will within a period of six months, the time as required by the law, and further having duly qualified as executrix and acted as such for seventeen months, the privilege was no longer open to her. She held, therefore, under the will and not against it, and the petition and decree for dower does not in strictness confer that or any other estate on her, but is a method permissible and proper under the statute by which her estate and interest is protected from creditors for the stipulated period of her natural life. *Tripp v. Nobles,* 136 N. C., 99; *Perkins v. Brinckley,* 133 N. C., 86; *Shackelford v. Miller,* 91 N. C., 181; *Simonton v. Houston,* 78 N. C., 408. This being the correct position, the petition and decree for dower did not amount in form or effect to a dissent from the will nor to any renunciation of the devisee's estate under it, and her mortgage carried to the mortgagee as security for her debt the entire estate, subject to the rights of creditors as they may have existed under the conditions presented. On that question the mortgage to secure $1,300 borrowed money, having been executed by the sole devisee more than two years, to wit, five years and one month, after the death of the testator, is effective against creditors, if taken in good faith and without notice of the insolvency of the testator's estate. Revisal, sec. 70; *Francis v. Reeves,* 137 N. C., 269; *Bunn v.* (546) *Todd,* 115 N. C., 138; *Arrington v. Arrington,* 114 N. C., 157.

There is no claim or suggestion in this instance that the mortgagee had actual notice, but it is insisted for plaintiff that the dower proceedings amounted in law to constructive notice, and that the widow being in possession of the property under a proceeding authorized by law and based on a petition containing allegations of insolvency, such possession is of itself sufficient to conclude the mortgagee as to notice; but we are of opinion that this position cannot be maintained on the facts as they appear of record. Our decisions are in full accord with the principle that when one buys real property from a vendor when a third person is in the open and notorious possession, the purchaser is held to take with knowledge or notice of the rights, legal or equitable, of

the possessor—a position that is held to be conclusive with us, and obtains also in favor of the landlord of the present occupant. *Staton v. Davenport,* 95 N. C., 11; *Tankard v. Tankard,* 79 N. C., 54; *Edwards v. Thompson,* 71 N. C., 177.

The doctrine in question assumes that the interest acquired antagonized the rights of the occupant, and proceeds upon the theory that a purchaser is held to inquire of such occupant how and in what way he holds his possession, and the better considered authorities are to the effect that it should receive a reasonable construction, and, being designed to prevent an acquisition of property under circumstances suggestive in many instances of fraud, should not be unduly extended to the injury of innocent and meritorious claimants.

In the present case, as we have seen, the dower proceedings did not in fact confer any estate on the widow and devisee. The judgment created no lien on the property, nor did the index of judgment give any indication or suggestion of the nature of the proceedings or the contents of any petition. At that time no adversary proceedings on the part of the creditors or any one of them had been instituted which threatened or tended to threaten the ownership of the widow. These were not commenced until more than a year after the execution of the mortgage, to wit, in April, 1892. When the mortgagee, therefore,
(547) was approached for a loan of money, it was by an occupant in possession as sole owner under the terms of her husband's will, and we think this was the extent of the knowledge that should be imputed to her under any reasonable or proper application of the principle of constructive notice, a ruling that best comports with the reason on which the doctrine rests and with the principles established by the weight of well-considered authority. *Francis v. Reeves,* 137 N. C., *supra; Ferguson v. Edrington,* 49 Ark., 207; *Lincoln v. Thompson,* 75 Mo., 613; *Mullin v. Butte Hardware Co.,* 25 Mont., 525; *Smith v. Yale,* 31 Cal., 180; *Rodgers v. Hussey,* 36 Iowa, 664; *Le Neve v. Le Neve,* 2 White and Tudor's Leading Cases Eq., Part 1, p. 109; 2 Pomeroy Eq., Jur., 1027. See note to *Niles v. Cooper,* 98 Minn., 39; *Garbritt v. Mayo,* 128 Ga., 269; *S. c.,* 13 L. R. A. (N. S.), 76; *Efferson v. Turpin,* 44 W. Va., 426.

In *Lincoln v. Thompson, supra,* it was held: "Possession may in some cases be evidence of a claim, but when a particular claim is notorious and is sufficient to account for possession no one is called on to speculate as to the existence of some other claim." And in the citation to Pomeroy's Equity the author says: "The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where a title under which the occupant holds

has been put on record, and his possession is consistent with what appears of record, it shall not be constructive notice of any additional or different title or interest to a purchaser who has relied upon the record and has had no actual notice beyond what is thereby disclosed."

The conclusion arrived at on this feature of the case is no wise affected by the fact referred to by plaintiff, that Thomas A. McCoy, the son of the testator, joined his mother in the execution of the mortgage. This was no doubt for the reason that by the terms of the will an interest was devised to him in case the mother should remarry, and has no significance one way or the other on the question of notice.

While we hold that the mortgagee to the extent of that interest, was an innocent purchaser within the purview of the (548) statute, we concur with his Honor's view, that there has been no valid foreclosure of the mortgage. Recurring to the facts of record, it appears that in April, 1892, A. M. Lee, for himself and all other creditors, instituted a general creditors'-bill against the executrix and sole devisee, for an account of the personalty and to enforce collection of their claims by judgment and otherwise by sale, if necessary, of all the real estate mentioned in the will of A. A. McCoy, deceased. In 1895, and before any proceedings commenced by the mortgagee, the heirs at law of the testator were duly made parties defendant. Judgment was entered, condemning the land, at February Term, and on sale plaintiff purchased and took a deed for the property. Under our decisions, this suit was notice to all persons interested of its purpose, and amounted to a *lis pendens* as to all the real estate of Judge McCoy embraced in the will and situate in the county of Sampson (*Arrington v. Arrington,* 114 N. C., 151), and on sale had under the decree the commissioner's deed conveyed to the plaintiff the equity of redemption, which at its institution and at the time of sale was in the devisee, subject to the payment of the testator's debts.

To the foreclosure proceedings instituted by the mortgagee, returnable to February Term, 1897, neither the creditors nor any one representing them were made parties, and under the principles recently announced in the well-considered case of *Jones v. Williams,* 155 N. C., 179, the interest arising to the creditors by reason of their suit and *lis pendens* was unaffected by the decree in the foreclosure proceedings. From this it follows that this defendant, the representative and devisee of Mrs. Giles, the mortgagee, has a valid lien on the entire property for the amount of his debt and interest, subject to a credit of the rents and profits of the property at $100 per year from the time possession was taken under the attempted foreclosure proceedings. That the plaintiff is the owner of said property subject to the above lien. That the appeals

of plaintiff and defendant be modified in accordance with this opinion. The costs of each appeal will be equally divided between them and an ordinary decree of foreclosure by sale of the property be
(549) entered.

Modified and affirmed.

WALKER and ALLEN, JJ., not sitting.

G. C. GRAVES v. H. D. CAMERON.

Filed 2 April, 1913.)

1. Judgments by Default—Nominal Damages—Inquiry as to Measure of Damages—Evidence.

A judgment by default and inquiry for want of an answer establishes only the fact that some damages are recoverable, leaving the amount open to inquiry, with the burden on plaintiff to prove it, and the defendant may show that it is nominal only.

2. Same—Action of Conversion—Mortgages—Novation.

Where damages are sought for the conversion of a mule sold under a registered chattel mortgage, and judgment by default has been obtained, it is comptent for the defendant to show that the mortgagee has since taken from the mortgagor other security and had canceled the mortgage of record, this transaction amounting to a novation of the mortgage debt, which would operate as a discharge to the defendant from any obligation he owed the plaintiff by reason of the latter's lien, to the full value of the mortgaged mule.

WALKER, J., dissenting; ALLEN, J., concurs in dissent.

APPEAL by defendant from *Peebles, J.*, at September Term, 1912, of MOORE.

U. L. Spence for plaintiff.

A. A. F. Seawell, Hoyle & Hoyle for defendant.

CLARK, C. J. The plaintiff held a duly registered chattel mortgage upon certain personal property of one D. M. Sutton, including two mules. Defendant purchased one of these mules, and this action was begun March, 1910, against him for the conversion of the mule. At December Term, 1910, no answer having been filed, judgment was taken by default and inquiry. At September Term, 1912, when the
(550) inquiry was executed before the jury, the plaintiff tendered the evidence of K. R. Hoyle and C. G. Petty to prove that in Sep-

tember, 1910, said Sutton then being in jail for disposing of the property, an arrangement had been made by which said Sutton executed a new mortgage upon real estate for the balance due upon the mortgage, in consideration of which the plaintiff agreed to cancel the chattel mortgage and drop the Cameron suit; that the chattel mortgage was marked "satisfied," and that Sutton, upon execution of the new mortgage upon the land, was discharged from jail.

This evidence should have been admitted. If it had been believed by the jury, there was a novation of the debt by Sutton and a release of any liability as to Cameron. The latter should have appeared at December Term, 1910, and have pleaded a release. Not having done so, the judgment by default simply established that he had been guilty of a conversion of the mule, and that he was liable for the costs of the pending action. His Honor refused a motion at a subsequent term to set aside this judgment on the ground of excusable neglect. There was no appeal, and we must take it that the judgment refusing to set aside was correct. But the judgment by default and inquiry settled only one thing, which was that the defendant converted to his own use a mule upon which the plaintiff held a lien at the date of the conversion, as alleged in the complaint. *Blow v. Joyner,* 156 N. C., 140, and numerous cases were cited: *McLeod v. Nimocks,* 122 N. C., 437; *Stewart v. Bryan,* 121 N. C., 46; 23 Cyc., 752; Black on Judgments, sec. 91.

In order to recover more than nominal damages, the plaintiff was called on to prove the amount of his lien or debt at the date of the trial, not to exceed the value of the property converted. *Parker v. House,* 66 N. C., 374; *Parker v. Smith,* 64 N. C., 291. In *McLeod v. Nimocks, supra,* it was held that a judgment by default for the conversion of cotton was not conclusive as to the number of bales converted. In *Parker v. House, supra,* it was held in an action upon a constable's bond for failure to exercise due diligence in collection of claims placed in his hands as an officer, that the judgment by default in no wise settled the matter of damages, but that defendants at the (551) trial could show that the debtors were insolvent, for the reason that in such case the diligence of the constable would not have availed the plaintiff and his damages would have been nominal.

The principle governing as to judgments by default and inquiry, as stated in the above cited cases and others, is that in actions sounding in damages a judgment by default merely fixes the fact that the plaintiff has a good cause of action of the kind pleaded; but the plaintiff must establish by evidence upon the trial of the inquiry every fact bearing upon the amount of damages, else he cannot recover more than nominal damages and costs.

In this case the plaintiff could recover damages only for such amount as was due upon the lien at the time of the trial, not exceeding the value of the mule. That amount was not a matter of law, and therefore could not have been established by the judgment by default, but must be proven at the trial upon the inquiry to assess the damages, and were such damages as was shown by evidence to exist at such trial. The judgment by default merely established as a matter of law that the defendant had been guilty of a conversion of the mule, and was liable for nominal damages and the costs. When it came to the establishment of the amount due, before the jury, the burden was upon the plaintiff to prove the amount of damages then due him, and it was competent for the defendant to show that there were no damages due, because prior to such trial he had paid the damages, or, as in this case, had been released by the agreement entered into for the cancellation of the chattel mortgage, the novation of the debt by Sutton, and the release of the defendant Cameron from liability.

Lee v. Knapp 90 N. C., 171, differs from this case in that there the offer was to prove on the inquiry of damages in the action that there had never been any liability on the part of the defendant nor any cause of action against him. Here the defendant admits that the default judgment establishes that there had been such liability and the cause of action.

But it was competent for the defendant to prove, as he offered to (552) do, that there was no liability beyond the costs, by reason of the release of defendant from such damages prior to the trial of the inquiry as to the damages. He does not claim that the action is barred, but that the plaintiff cannot recover damages which he released before the trial to determine the amount of damages came on.

Error.

WALKER, J., dissenting: My opinion is that the transaction between the parties, by which the former mortgage was satisfied and canceled, with a stipulation that this suit should be dismissed, was a bar in law to the further prosecution of this action, and, therefore, was not such matter as could be proved in diminution of damages upon the execution of a writ of inquiry. If it had been duly and properly pleaded, the court would have dismissed this action. As said at this term, in *Patrick v. Dunn,* 162 N. C., by *Justice Allen:* "Evidence in bar of plaintiff's right of action is not admissible on an inquiry as to damages," citing *Blow v. Joyner,* 156 N. C., 140. Plaintiff could not, therefore, upon the facts, have a judgment even for nominal damages and costs. Having settled his cause of action, there was nothing left to try, and he would have been dismissed from the court, with costs to defendant. *U. S. v. Chou-*

teau, 102 U. S., 603; *Parker v. Riley*, 21 Ga., 427; *Kohn v. Zimmerman*, 34 Iowa, 544. It was held in *Parker v. Riley, supra*, that where a cause of action is compromised, and settled, the remedy is on the contract of compromise, not on the original cause of action, and the pending action can proceed no further. The general rule is that it will be dismissed at plaintiff's cost.

JUSTICE ALLEN concurs in this dissenting opinion.

Cited: *Armstrong v. Asbury*, 170 N. C., 162.

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(553)

COY R. JONES v. JOHN D. K. RICHMOND ET AL.

(Filed 9 April, 1913.)

1. Wills—Devises, Fee Simple—Interpretation of Statutes.

A devise of land is construed to be in fee simple, unless otherwise expressed, or the intent of the testator, gathered from the will itself, shows to the contrary. Revisal, 3138.

2. Wills—Interpretation—Devises, Fee Simple—Trusts and Trustees—Descent and Distribution.

Where by an item in a will, which is complete in itself and requires no further construction of the other parts of the will to show the intent of the testator, a devise of lands is made to four of his children, appointing a trustee to whom the executors are to turn over the real and personal property therein mentioned, to be used by him in his discretion for their maintenance and support until the youngest devisee becomes 21 years of age, and then the trustee may apportion among them certain amounts, either in money or property, as he may deem proper and right: *Held*, that the fee-simple title of the lands devised in this item vested in the four children therein named, subject to the trust imposed, and upon the death of one of them during minority it descended to her heirs at law.

3. Wills—Property—Words and Phrases—Interpretation—Intent—Items Construed Together.

While the word "property" is broad enough under some circumstances to embrace realty as well as personalty, it will not so be construed as to apply the language used in one item of the will, where it was so intended, to another item which is complete in itself and expresses a different intent.

4. Same—Fee Simple—Contingent Limitations.

Where in a certain item of a will a bequest is made to four of the testator's children named in the preceding item, "not to be sold, and used

for their good. If either of these four last named children should die, the property to go to the survivors of said four children," it is *Held*, that by the use of the word "property," the testator had reference only to the property mentioned in this item, and not to that of the former item, wherein by proper construction the lands therein specified were devised in fee, subject to certain trusts imposed for the benefit of these children.

APPEAL by defendant from *Whedbee, J.*, at November Term, 1912, of PERSON.

Byant & Brogden for plaintiff.

L. M. Carlton, S. M. Gattis, Carver & Winstead, E. Lunsford, for defendants.

CLARK, C. J. This is a petition for partition, the plaintiff (554) claiming an undivided one sixteenth interest in the lands described in the complaint. The answer having denied the title of the plaintiff, the cause was transferred to the Superior Court for trial. In that court it appeared from the admissions of the parties that the title depends upon the construction of the will of D. W. K. Richmond, who left surviving him one daughter, Mollie, by his first wife, now deceased, whose only child is the plaintiff. He left by his second wife four children, one of whom, Frances Kate, died soon after the testator, at the age of 7 years. The plaintiff claims that the realty devised in items 3 of the will to the four children by the second marriage became vested in them in fee, and that at the death of Frances Kate, he became entitled as heir at law to one-fourth of her interest, *i. e.*, to one-sixteenth of the 4¼ acres which is the real estate in controversy. The defendants claim, on the contrary, that on the proper construction of said item 3 of the will, that on the death of Frances Kate they became entitled to her interest.

The defendants claim that items 2 and 4 throw light upon the proper construction of item 3.

Items 2, 3, and 4 of the will are as follows:

"Item 2: I give unto my daughter Mollie the tract of land lying between the Roxboro and Hillsboro roads and the Durham and Milton road, including the dwelling-house I now live in, with all other outside improvements, barns, etc., also one-half interest in the lands in Orange County; also one-half interest in the lands of Dallas County, Ark.; also the parlor furniture, including the piano; also two beds and steads, one bureau in the girls' room; and my desire is that my daughter Mollie divide the bedclothing between herself and my other children. It is my wish that none of the house furniture be sold that will be of service to the children.

"Item 3: The balance of my lands, including mills and store lot, I leave to my other four children, Eugene J., John D. K., (555) Earl, and Fannie Kate. And it is my desire that S. Y. Brown become trustee for my four children above named without being required to give bond as trustee. And it is my desire that my executors hereinafter named turn over to the said trustee all lands and money that said children are entitled to, to be used by said trustee at his discretion for the maintenance, support, and education of said children until the youngest child becomes 21 years old; if, in the discretion of the trustee, as the children become of age, he may apportion certain amounts, either in money or in property, as he may deem proper and right.

"Item 4: It is my desire that all my household and kitchen furniture not already mentioned that can be preserved and used for the benefit of my four last named children be not sold, and used for their good; if in case either of these four last named children should die, the property to go to the survivors of said four children."

Revisal, 3138, provides. "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

His Honor held that the real estate in item 3 became vested in fee in the four children therein named, and hence that at the death of Frances Kate her one-fourth interest descended upon her heirs at law, one of whom is the plaintiff, the only child of her deceased sister, Mollie.

The subject matter referred to in item 3 is not referred to either in item 2 or item 4. Item 2 devises certain lands to Mollie, the daughter of testator, and also gives her a few articles of personal property and directs her to divide the bedclothing between herself and his other children, expressing the wish that none of the house furniture be sold that would be of service to the children. This is emphasized in item 4 which expresses a wish that "all my household and kitchen furniture not already mentioned that can be preserved and used for the benefit of my four last children be not sold, but used for their (556) good; if in case either of the four last named children should die, the property to go to the survivors of said four children." The defendants asked the court to construe the word "property" in item 4 to embrace the real estate devised in item 3, and thus to place a limitation for life thereon. This would be a forced construction. Item 3 is complete in itself, as to the real estate therein given, as much so as item 2 to the real estate therein devised. Item 4 has reference only to the household and kitchen furniture, and the word "property" as therein

used naturally refers to said articles of personal property mentioned in that item. While the word "property" is broad enough to embrace real estate under some circumstances, in the connection in which it is here used it evidently applies only to the household and kitchen furniture in said item 4.

If the word "property" used in item 4 extended to embrace the real estate, it would follow that in case of the death of either of the last four named children such realty would go to the "survivors" and not to their children, should they have any, which intention cannot reasonably be imputed to the testator.

The first sentence in item 3 devises the land therein given to his four children named. The second sentence names the trustee for them, to act without bond. The third is a direction to his executor to turn over to the trustee all lands and moneys that said children are entitled to, to be used by the trustee at his discretion, for their maintenance, support, and education until the youngest should become of age, the trustee being authorized in his discretion, as the children severally become of age, to apportion certain amounts in money or property to them, as he might deem right and proper. There is no limitation, no creation of a life estate, and no words to restrict the interest, or suggest how it should go upon the death of either of the children. If Frances Kate had lived till she was 21, or had died leaving children, is there any question that said real estate at her death would have gone to her children or heirs at law? Yet if the word "property" in item 4 applied to the realty in item 3, then if Frances Kate had died leaving children the realty would have gone to the "survivors" of the four children,
(557) and if she had arrived at age, she could not have conveyed her interest in fee.

The court below properly held that Frances Kate took the realty in fee, and that upon her death one-fourth interest in her share descended upon the plaintiff as one of her heirs at law.

Affirmed.

IN RE WILL OF THOMAS F. LLOYD.

(Filed 9 April, 1913.)

1. Pleadings—Estoppel—Judgment—Caveat.

Where in an action to construe a will there is allegation that the will is valid, and a party to that action neither denies the allegation nor requests the court not to proceed with the cause until he has been afforded an opportunity to file his caveat, and the matter has been finally

adjudicated and distribution under the will directed, the party thus acting is thereafter barred of any right he may have had to caveat the will and have it set aside.

2. Wills—Caveat—Judgment—Estoppel—Limitation of Actions—Interpretation of Statutes.

While the filing of a caveat to a will is not barred by the statute until after the lapse of seven years, this does not apply when the party is estopped by a former judgment, Revisal, sec. 3135, not being an enabling statute, but creating a bar from lapse of time where there was none before.

APPEAL from *Whedbee, J.*, at October Term, 1912, of ORANGE.

Stern & Duncan, S. M. Gattis for caveator.

John W. Graham, Mangum & Woltz, and Victor S. Bryant for propounders.

CLARK, C. J. This is an action by W. P. Lloyd to set aside the will of Thomas F. Lloyd, who died in 1911, leaving a will which was duly probated. He was survived by a widow and several brothers, among them the caveator, W. P. Lloyd. The widow of the testator, Caroline Lloyd, within the time prescribed by law, dissented from the will. The executors brought action in September, 1911, in which (558) the complaint alleged that Thomas F. Lloyd had left a will which had been duly admitted to probate and recorded, annexing a copy thereof as a part of the complaint; that the executors had duly qualified, that the widow had dissented, and asking that her dower should be allotted and for a construction of the will. The complaint also set out the realty and other property of the decedent and asked that the property be sold and for such orders and decrees as might be necessary. In that proceeding all the heirs at law and devisees were made parties defendant, except those that were named as plaintiffs. The plaintiff in this action accepted service of the summons therein. A decree was entered in said action construing the will, directing the allotment of dower, the sale of realty, confirming the sale and directing disposition of proceeds in accordance with the prayers of the complaint.

The proceedings and judgment in the above action are pleaded as an estoppel against this proceeding to caveat the will. This plea was sustained, and the caveator, W. P. Lloyd, appealed. His Honor properly held, "The said W. Pinckney Lloyd was estopped by the judgment and decree rendered in said action defining his rights as heir at law and next of kin of the said Thomas F. Lloyd, and as he raised no question as to the validity and execution of the will of said Thomas F. Lloyd, filed as a part of the complaint in that action, he cannot now be heard to do so. And it is therefore ordered and adjudged that the caveat filed by him be dismissed at his cost."

W. P. Lloyd, the plaintiff in this proceeding, was a party to the former action, in which the will was set out in full, its validity averred, and in which it was asked that the will be construed, the realty sold, dower allotted, and the executor instructed as to the disposition of the estate. He made no objection or exception, though he accepted service of the summons therein. All the parties were before the court, the validity of the will was averred, and he could have made it an issue by his denial of such averment. But he did not choose to do so, and is now estopped by the judgment and decrees in that action. It may be
(559) that W. P. Lloyd, a defendant in that action and the plaintiff in this, could have treated that action as a proceeding to prove the will in solemn form. But however that may be, he could certainly have denied the first paragraph of the complaint, which alleged the validity of the will, and have asked that the other allegations of the complaint be not passed upon until the caveat which he had filed, or would file, was adjudicated. He chose to do none of these things, and cannot now be heard to raise a contest as to the validity of the will, which he admitted by his failure to take any action.

Among the cases which sustain the judgment of the court in this matter are *Fisher v. Boyce,* 81 Md., 52, in which the Court held that where the executors had filed a petition to have the will construed and in which a decree was entered, the parties to that action would be estopped afterwards to allege the invalidity of the will because of duress or fraud. The Court said: "With respect to the question of estoppel, which is the second question raised by the appeal, we think in the present state of the record the appellees have by their conduct denied themselves the right to institute these proceedings. A party cannot, either in the course of litigation or in dealings *in pais,* occupy inconsistent positions, and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and the facts, determines his election and works an estoppel. It is an old rule of equity that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will," quoting from Bigelow on Estoppel, 562, and citing *Waters' Appeal,* 35 Pa. St., 523, and *Thrower v. Wood,* 53 Ga., 458. It does not appear that in those cases those held barred by the estoppel actually received any benefits under the decree construing the will.

Another case in point is *Corprew v. Corprew,* 84 Va., 599, in which, action having been brought to construe the will and a judgment entered,

a party to such proceeding afterwards sought to impeach the will, the Court held, as stated in the headnote: "Where a court of (560) competent jurisdiction, in a former suit, construed a will according to the prayer and allegation of the bill and answer, and declared it to be the will of testator, this decree is conclusive against the same complainants, seeking in a new suit, against same parties, to have said will declared not to be the will of said testator"; and in the opinion of the Court it is said: "He is now estopped to deny, not only his own allegations, and the proceedings based thereon, in which he acquiesced, but a decree of the court construing the will in favor of his allegations, entered and based upon a statement of facts agreed and consented to by him." To same effect, *In re Vedder's Will,* 15 N. Y. Sup., 798.

In *Allen v. Allen,* 121 N. C., 328, and *Tiddy v. Graves,* 126 N. C., 620, it was held that an executor who qualified under the will is estopped from denying the provisions of the will.

The case of *In re Thomas,* 111 N. C., 409, relied on by the plaintiff, omits in the second headnote the word "not" before the word "parties," and expresses the opposite of what the Court really held on page 407, where it is said: "They were not parties to the proceedings nor entitled as privies to hold caveators bound by any admission or adjudication made therein." In *Keith v. Scales,* 124 N. C., 497, the Court treated as entirely regular a proceeding to prove the will in solemn form and to obtain a construction of the same. This in effect was the purport of the action in this case. William P. Lloyd, as already stated, could in that proceeding either have denied the validity of the will, as alleged in paragraph 1 of the complaint, or could have asked for suspension of further action till the decision upon the caveat which he had filed or intended to file. It is too late to do so now, when the will has been held valid, the real estate sold, sale confirmed, and disposition of the proceeds ordered.

The point now attempted to be raised in this proceeding as to the validity of the will was necessarily passed upon, or admitted, in the former action, and hence the judgment therein is an estoppel. *Gay v. Stancill,* 76 N. C., 369; *Davis v. Hall,* 57 N. C., 405; *Tuttle v. Harrill,* 85 N. C., 456; *Yates v. Yates,* 81 N. C., 400; *Edwards v. Baker,* 99 N. C., 258.

"The judgment by default is as conclusive an adjudication between the parties as to whatever is essential to support the judg- (561) ment as one rendered after answer and contest. The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, 'Has there been such a determination?' and not upon what evidence or by what means it was reached. Bigelow on Estoppel says: 'Judgment by default, like judgment on contest, is

conclusive of what it actually professes to decide, as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.'" *Mining Co. v. Mining Co.,* 157 U. S., 691.

In *Wagon Co. v. Byrd,* 119 N. C., 462, this Court said: "The principles governing estoppel by judgment are established by a long line of decisions in this and other States, and we have no desire to take a new departure which will shake the settled law as to *res judicata.* The ruling is thus stated, 1 Herman on Estoppel, sec. 122, and is fortified by a long list of leading authorities there cited: 'The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. It is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of diligence and attention; a different course might be dangerous and often is oppressive. It might tend to unsettle all the determinations of the law and open a door for infinite vexation. The rule is founded on sound principle.' And the same authority, sec. 123, says: 'The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belongs to the subject in litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.'" See *Tayler v. Capeheart,* 125 N. C., 64.

The plaintiff "having been silent when he should have been (562) heard, cannot now be heard when he should keep silent."

While it is true that a caveat is not barred by the statute of limitations till after the lapse of seven years, this does not prevent the application of an estoppel. Indeed, the statute 1907, ch. 862 (Pell's Revisal, 3135), is not an enabling act, but creates a bar from lapse of time when there was none before. *In re Beauchamp,* 146 N. C., 264.

The judgment of the court below is

Affirmed.

Cited: Poplin v. Hatley, 170 N. C., 168.

KINSTON COTTON MILLS v. LIABILITY ASSURANCE CORPORATION.

(Filed 19 March, 1913.)

1. Insurance—Employer and Employee—Indemnity—Cost of Defending Suit.

A provision in a policy indemnifying an employer, that the company "will at its own cost defend suits in the name and behalf of the insured" for injuries to an employee covered by the policy, renders the insurer liable for reasonable expense incurred by the employer in defending a suit contemplated by the policy, wherein he was successful and unable to recover the costs under an insolvent prosecution bond.

2. Insurance—Indemnity—Structural Alterations—Ordinary Alterations—Interpretation of Policy—Words and Phrases.

Where a policy of indemnity insures an employer against "damages on account of bodily injury" to an employee, "including death," and in express terms excludes injury or death caused to "any person in connection with the making of additions to or structural alterations in, . . . any building or plant," by the term "structural alteration" is meant such as would change the physical structure of the plant, and not such as would be an "ordinary alteration or repair," and in this case it is held that it was a question for the jury as to whether the substitution of a brick chimney for iron smokestacks was only an "ordinary alteration," and not excluded by the provision of the policy.

3. Same—Opinion—Evidence—Observation.

Upon the question of whether the substitution of a brick chimney for iron smokestacks at the plaintiff's plant was an ordinary alteration, it was competent for a witness of long experience in such matters to testify, from his own observation, whether the alteration was an ordinary one, and not excluded from the policy of indemnity of the employer by the terms "structural alterations" therein used.

4. Insurance—Indemnity—Employer and Employee—Ordinary Alterations.

The plaintiff contraced to have a brick chimney built to replace iron smokestacks used in its plant, and as a part of the consideration agreed to furnish sand from its own premises. While its employee was digging out the sand, it caved in on him, causing his death: *Held*, the employer was indemnified for the death of the employee under a policy wherein the insurer was made liable for the death of an employee, suffered "while within or upon the premises, etc., by reason of the operation of the trade or business . . . including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant, and their maintenance in good condition."

APPEAL by plaintiff from *Carter, J.*, at November Term, 1912, of LENOIR.

Rouse & Land for plaintiffs.
Davis & Davis and K. O. Burgwyn for defendant.

CLARK, C. J. This is an action on an insurance indemnity con-
(563) tract, for the recovery of $1,135 for expenses paid in defending a suit against the plaintiff, brought by Flanner, administrator of R. E. Hawkins, an employee of the plaintiff, on account of the alleged negligence of plaintiff causing the death of said Hawkins while at work in the employ of the plaintiff. Said indemnity policy contained a provision of insurance for liability "for damages on account of bodily injuries, including death, resulting therefrom, accidentally suffered by any employee of the assured while within or upon the premises or ways adjacent thereto, by reason of the operation of the trade or business described in the schedule, including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant and their manitenance in good condition."

The policy excludes liability for injury or death caused to "any person in connection with the making of additions to or structural alter-
(564) ations in, or the construction of, any building or plant." There is also a provision that, "the corporation will at its own cost defend such suits (even if groundless) in the name and behalf of the assured." In this case the action by Flanner, administrator, was unsuccessful. The defendant admitted that the sum of $1,135 was paid out by the plaintiff in the proper and necessary defense of the action against it, and that this amount was a reasonable expense in the defense of the action. It was also admitted that the estate of Hawkins was insolvent, and that the plaintiff did not recover back any costs or expenses paid out by it in defending said action, and also that the plaintiff gave all notices required by the terms of the policy, its defense resting upon the ground that the injury was not one covered by the policy.

The evidence is that two iron smokestacks used by the plaintiff being unsatisfactory, the plaintiff contracted with an independent contractor to have a brick chimney erected to take the place of the two iron stacks. The plaintiff, however, contracted to furnish the sand, crushed rock, and the ordinary building brick. The plaintiff undertook to get the sand upon its own premises, and for said purpose R. E. Hawkins, who was a mill hand, was engaged, together with other employees, digging sand from a hole on plaintiff's premises, when he met his death by the caving in of the hole.

We think the court erred in refusing to permit the witness Taylor, who had twenty years experience in the cotton mill business, to state whether work of this character was the repair of, or an addition to, the mill plant. The evidence offered was not a mere matter of opinion, but the result of knowledge and observation by the witness. *Davenport v. R. R.*, 148 N. C., 287; *Ives v. Lumber Co.*, 147 N. C., 306; *Morrisett v. Cotton Mills*, 151 N. C., 33. It is true, the jury upon all the evidence

could have drawn their own conclusion on this point. But the evidence of Taylor, if it had been admitted, would have been only a matter for consideration by them, and not conclusive.

The real point in the case is in regard to the correctness of the nonsuit ordered by the court, and upon this the evidence must be taken in the light most favorable to the plaintiff.

It is not clear that the employment in which Hawkins met his death was in the "making of an addition to, or structural altera- (565) tion in, or in the construction of, any building or plant." It would seem he was simply a mill employee, digging sand on the premises of the plaintiff, for use in the "making of repairs and for such ordinary alterations as are necessary in the care of the premises and plant and their maintenance in good condition."

The erection of a brick chimney in the place of the two iron stacks which had proven unsatisfactory may have been an alteration which was "necessary to the care of the premises and plant." It is true, the plaintiffs had engaged an independent contractor to erect the chimney, but besides paying him for his work, the plaintiff agreed to furnish the brick and the sand. To the latter end it took the sand off its own premises by the labor of its own employees. To that extent Hawkins was engaged in making an alteration which was necessary for the plant and its proper maintenance. The "structural alteration," which was excepted by the policy, would be such alteration as would change the physical structure of the building and plant. That was not done here by the erection of a brick chimney in the place of the two iron stacks, which would seem a mere incidental or ordinary alteration, necessary to the maintenance of the plant in good condition, and therefore within the terms of the policy. If so, it was an ordinary, and not an extraordinary alteration (which last required a special permit), and the plaintiff was engaged in making such alteration to the extent of digging sand therefor with its own employees.

At the least, there being a controversy whether the work of substituting one chimney for two was a "structural alteration," which was excluded by the terms of the policy, or an "ordinary alteration or repair," which was within its terms, the question should have been submitted to the jury as a mixed question of law and fact under proper instructions from the court and with the aid of the evidence of Taylor, which was improperly excluded.

The judgment of nonsuit is set aside.

Reversed.

(566)

ROPER LUMBER COMPANY v. L. F. SWAIN.

(Filed 19 March, 1913.)

1. Wills—Lands Sold for Distribution—Executors and Administrators—Power of Sale.

The general rule that where land is devised to be sold for division among the heirs or devisees, without more, the executor is without power to convey, does not obtain when a contrary intention appears from the terms of the will.

2. Same—Interpretation of Wills—Intent.

Where a will disposes of a large real and personal estate, and directs very generally a sale for division among the heirs and legatees, and concludes with the provision that the executors shall "to all intents and purposes execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof," the intention of the instrument is to confer on the executors the power to sell and convey the lands for the division specified therein.

3. Deeds and Conveyances—References for Description—Presumption—Register of Deeds—Parol Evidence of Location.

Where a deed purporting to convey large tracts of land refers to various former deeds in the chain of title for description, giving the county, number of book and the page, the entries necessarily refer to the books in the office of the registers of deeds of the respective counties, which become a part of the description of the conveyance in question, and when these descriptions are not too vague or uncertain, parol evidence is competent to identify the land thereunder.

4. Deeds and Conveyances—Lappage on Lands—Possession—Outer Boundaries—Color—Exclusion in Boundaries.

Where there is a lappage upon lands according to the description of plaintiff's and defendant's deeds, including the *locus in quo*, the defendant cannot establish his title thereto by seven years adverse possession under color, claiming to his outer boundaries, when muniments of title in the line claimed by the plaintiff are recognized in the deed under which defendant claims, and excludes the lands in controversy.

APPEAL from *Carter, J.*, at July Term, 1912, of ONSLOW.

Civil action, trespass *q. c. fr.*, involving also an issue as to title.

The jury rendered the following verdict:

First. Did the defendant trespass upon the lands of the plaintiff,
(567) as alleged in the complaint? Answer: Yes.

Second. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $50.

Third. Is defendant's lessor the owner of the lands described in the answer, or any part thereof? Answer: Yes.

Fourth. If so, what are the true boundaries of said lands? Answer: Beginning at A, running to B; thence 10 poles and 21 L to the nearest point in the edge of the pocosin, thence with the edge of the pocosin to the letter R; thence to S; thence to I; thence to J; thence to K; thence to L; thence to M, and thence back to the beginning, as indicated on the map by the letter A. The above description shown on map.

Judgment for plaintiff and defendant excepted and appealed.

Frank Thompson and L. I. Moore for plaintiff.
Robert Ruark and J. B. Schulken for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to establish title in one Christopher Stephens; that the same had passed by mesne conveyances to plaintiff company, and that defendant had committed trespass upon the land therein conveyed. One of the deeds in the line of plaintiff's title was that of George H. Simmons, executor of Christopher Stephens, and it was insisted for defendant that the executor had no power to make a conveyance of testator's realty.

The general rule undoubtedly is that where land is devised to be sold for division among the heirs or devisees, without more, the executor is without power to convey (*Council v. Averett,* 95 N. C., 131), but the rule yields when a contrary intention appears from the terms of the will, and we are of opinion that the modification of the rule should prevail in the present case. The will disposes of a large real and personal estate, including the land in controversy, and directs very generally a sale of the same for division among the heirs, legatees, etc., chiefly among his four children, and concludes with the provision appointing the executors: "To all intents and purposes to execute this my last will and testament according to the true intent and meaning of the same and every part and clause thereof." A clause of this character was held to confer on an executor the power to sell realty in *Saunders v. Saunders,* (568) 108 N. C., 327, and the authority is decisive of the question presented by this exception. Again, it was objected that two of the mesne conveyances in the line of plaintiff's title were defective in that they did not contain written words sufficiently definite to permit the introduction of parol testimony to fit the description to the land conveyed. These deeds, one from W. B. Blades and others to the Blades Lumber Company and from that company to plaintiff, purported to convey large tracts of land lying in the counties of Craven, Jones, Onslow, Pamlico, and Carteret, State of North Carolina, and referring to the various deeds for description in terms as follows: "E. B. Hackburn, Craven County, Book 34, p. 390," giving each deed by name, book and page.

"Jones County: Brinkley, Charles and wife, Book 40, p. 535," etc., giving each deed by name.

"Onslow County: Andrews and Hall, Book 67, p. 237. Simmons, G. H., *et al.*, Book 67, p. 461. Simmons, G. H., Book 67, p. 271," etc., giving each deed by name of parties, book, page, etc., and like reference in other counties. These entries must refer to the registry books of the respective counties, the only place where deeds for land are or are required to be registered. Without the aid of parol evidence, they carry the mind unmistakably to these books, and, this being true, the deeds referred to for purposes of description become a part of the conveyances just as much as if incorporated in them. *Gudger v. White,* 141 N. C., 507; *Everett v. Thomas,* 23 N. C., 252. It was further urged that defendant was protected by reason of adverse occupation for the required time, under his own deeds and grant and color, and that, being upon the lappage, the force and effect of such occupation would be carried to the outer boundaries of the deed, covering the *locus in quo.* The position is sound in proper instances, but, as applied to the facts of this case, it does not aid the defendant. The description in his own grant and deed recognizes and calls for the "Williams patent" and the "John Wilkins patent," two of the muniments of plaintiff's title, and exclude the effect of his deeds as color beyond these two lines. Defendant had no color of title, therefore, beyond the line of these patents, and, without this, his occupation did not suffice to mature his title. On (569) perusal of the record, we find no error, and the judgment in plaintiff's favor must be affirmed.

No error.

Cited: Broadhurst v. Mewborn, 171 N. C., 402, 403.

L. T. BYRD ET AL. V. J. A. SEXTON.

(Filed 19 March, 1913.)

1. Deeds and Conveyances—Description of Lands—Parol Evidence.

In an action to recover damages of a grantee for wrongfully cutting timber, it appeared that the deed to the timber in question described the lands on which the timber was situated as follows: "All the timber of the size and kind hereinafter named" on the tract of land in a certain named township and county, adjoining the lands of T. L.'s estate, and others, and being the tract upon which the grantor then resided, containing a stated number of acres: *Held,* the land is sufficiently described to admit of parol evidence to fit the land to the description.

2. Same—Standing Timber—Size Not Specified—Interpretation of Deeds.

Where a conveyance of timber on certain described lands fails to state the size of the trees to be cut therefrom, it passes title, in the quantity specified, to all the timber trees growing upon the land or lying thereon in their natural state which are capable of being sawed into merchantable lumber by the mills and methods usually employed by sawmill men in that vicinity.

3. Deeds and Conveyances—Standing Timber—Time for Cutting and Removing Timber—Extension Privilege—Intent—Interpretation of Deeds.

Where a conveyance of standing timber on described lands provides that the grantee "shall have four years from the date of the deed to commence cutting and removing the timber, and in case the same is not commenced within that time" the conveyance and all the provisions and agreements for paying for said timber to be void, the quantity sold being 100,000 feet, with the privilege to the grantee of cutting the same amount, at the same price, in addition, which privilege was exercised and the terms of payment complied with: *Held*, from the intent gathered from the entire instrument, the grantee therein had four years from its date in which to enter upon the land and commence cutting, and having commenced cutting within that period, and given notice of his election to take the additional 100,000 feet and tendered the money within the time, he must be allowed, after the four years, the reasonable time required to continue and complete the cutting of the amount stipulated for in his deed.

APPEAL from *Ferguson, J.*, at November Term, 1912, of HARNETT. (570)

Civil action to recover damages for wrongfully cutting trees on the lands of plaintiffs. Plaintiffs, as heirs at law of L. W. Byrd, deceased, sued defendant, alleging a wrongful cutting of timber on the land under a timber deed from L. W. Byrd, bearing date 13 November, 1905. Defendant denied any cutting in excess of the rights and interests conveyed to him under the deed. The jury rendered the following verdict:

First. Did the plaintiff's ancestor, L. W. Byrd, on or about 13 November, 1905, sell to the defendant, J. A. Sexton, 100,000 feet of timber to be cut on the land described in the complaint and answer, at the price of $2 per thousand feet, with the privilege of cutting an additional 100,000 feet upon the same terms, as alleged in the answer? Answer: "Yes."

Second. Did the defendant wrongfully and unlawfully enter upon the lands mentioned in the complaint and answer? Answer: "No."

Third. Did the defendant wrongfully cut and carry away from said land any timber after the death of L. W. Byrd? Answer: "No."

Fourth. How many feet of timber has the defendant wrongfully cut and removed from said land? Answer: "None."

Fifth. If so, what are the plaintiffs entitled to recover therefor? Answer: "Nothing."

Judgment for defendant, and plaintiff excepted and appealed.

W. P. Byrd, E. F. Young, and R. L. Godwin for plaintiff.

D. H. McLean & Son and Clifford & Townsend for defendant.

HOKE, J. The evidence tended to show that on 13 November, (571) 1905, L. W. Byrd, deceased, under whom plaintiffs claim, conveyed to defendant by written deed, duly executed, "all the timber of the size and kind hereinafter named" on the tract of land in Lillington Township, Harnett County, N. C., adjoining the lands of Florence Truelove, E. J. Lilly's estate, and others, and being the "tract of land on which I now reside, containing about 240 acres," together with the full right and privilege for and during the term of four years from date of conveyance, in person or through their agents or servants, to enter upon said land, and pass and repass over same, to cut and remove said timber, construct and operate tramways, etc., deemed necessary for the purpose for cutting or removing the timber hereby conveyed, and to operate and use same as long as said parties may desire, etc. The payment for said timber to be as follows: $50 down, $50 when cutting is commenced, and $100 more when 100,000 feet are cut; and the party sells and confers upon the party of the second part the privilege of cutting an additional 100,000 feet at the same price, etc. The deed closing with the following provision: "It is understood and agreed by said party of the first part that the said party of the second part, his heirs and assigns, shall have four years from the date of this conveyance to commence the cutting and removing of said timber, and in case the same is not commenced within that time, then this conveyance and all provisions and agreements for payment for said timber are to be null and void."

There was evidence on part of defendant tending to show that the land on which the timber was cut was the same land referred to and described in the deed. That defendant had entered and cut the first 100,000 feet within the four years, and within that time also had notified the owners that he elected to take the second 100,000 feet at the contract price and had offered to pay the same to the executors and heirs at law of his grantor, L. W. Byrd.

On the part of the plaintiff, it was proved that there were five or six hundred thousand feet of pine lumber on the land and large quantities of gum, oak, poplar, etc.

Upon this, the evidence chiefly relevant to the question pre- (572) sented, it was objected for plaintiff: (1) That the deed under

which defendant claimed was void by reason of insufficient description of the land. (2) By reason of vague and insufficient description of the timber. (3) By reason of conflicting and indefinite stipulations as to the time when the cutting of the timber should take place. But in our opinion neither position can be sustained. On authority, the land is sufficiently described to admit of parol testimony to fit the description to the property. *Ward v. Gay,* 137 N. C., 397; *Rowe v. Lumber Co.,* 133 N. C., 433; *Perry v. Scott,* 109 N. C., 374; *Eulis v. McAdams,* 108 N. C., 507.

And as to the timber, the land being properly described and identified, the descriptive words are sufficient to pass to the extent of 200,000 feet all the timber trees growing upon the said land or lying thereon in their natural state which were capable of being sawed into merchantable lumber by the mills and methods usually employed by sawmill men in that vicinity. *Wiley v. Lumber Co.,* 156 N. C., 211; *Ward v. Gay, supra; Nash v. Driscoe,* 51 N. C., 417; *U. S. v. Stones et al.,* 14 Fed., 824; *Hubbard v. Barton,* 75 Mo., 65.

On the third position, having proper regard for the rule that the intent of the parties must be gathered from the entire instrument and that each and every part should be allowed significance when this can be done by any reasonable construction (*Hendricks v. Furniture Co.,* 156 N. C., 569), we are of opinion that the defendant, the grantee in the instrument, had four years time from the date of the contract in which to enter on the land and commence cutting, and having commenced within said four years, and having given notice of his election to take the additional 100,000 feet, and tendered the money within the time, he must be allowed after the four years the reasonable time required to continue and complete the cutting of the amount stipulated for in his deed. *Bateman v. Lumber Co.,* 154 N. C., 248; *Milling Co. v. Cotton Mills,* 143 N. C., 307.

According to all the testimony, the defendant had entered and commenced cutting within the four years, to wit, some time in September, 1909, and having cut and paid for the first 100,000 feet, he gave notice within the four years of his election to take the additional 100,000 feet, and tendered the money therefor both to the executor of his (575) grantor and several of the heirs. To the extent of the 200,000 feet, therefore—and there is no claim he has gone beyond this—defendant has only cut within the rights belonging to him by the terms of his contract, and has been properly absolved from liability to plaintiffs.

There is

No error.

R. E. BROWN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 March, 1913.)

1. **Carriers of Passengers—Negligence—Duty of Conductor—Assault on Passenger—Anticipation of Assault—Protection of Passengers.**

A conductor on a railroad passenger train is held to a high degree of care in looking after and protecting passengers on his train, and he is clothed, to some extent, with the powers of a peace officer; and if he fails to act in certain instances it may be imputed to the company's wrong; and it is held that, by reason of these exigent duties and of his right to protect himself in emergencies, a right present in negligence as well as in other cases, he is not always required to await developments or remain inactive until there is some overt act by a passenger importing a present physical menace either to himself or the other passengers; but in view of all the facts known or as they may reasonably appear to him, he may at times interfere to prevent or forestall violence.

2. **Same—Damages—Justification of Conductor—Evidence.**

In an action to recover damages of a railroad company for an assault upon the plaintiff, a passenger, as he was leaving the train, there was evidence tending to show, and *per contra*, that the plaintiff's conduct on the train was improper; that he did not give his ticket to the conductor, who required him to pay his cash fare, whereupon the plaintiff threatened the conductor when he reached his destination; that passengers warned the conductor to look out for the plaintiff at his destination, that he was armed with a pistol; and that the conductor had other employees of the road present at the steps of the car at the station where passengers were alighting; that as plaintiff was getting off the train, with a bundle under his arms, he was seized by the other employees and searched by the conductor for a weapon, which he failed to find; that the manner of the search made by the conductor was by passing his hands over the plaintiff's clothes, gently slapping the pockets; that after the plaintiff was released he assaulted the conductor, resulting in being knocked down by him, and for which assault the plaintiff seeks to recover the damages alleged; it is *Held*, that an instruction that the jury find for the plaintiff if they believe the evidence erroneous, for it was a question for the jury to determine, in view of the facts as they reasonably appeared to the conductor, whether he was justified in seizing and searching the plaintiff as he was alighting from the train.

3. **Verdict, Directing—Evidence, How Considered—Defendant's Rights—Contradictory Evidence—Negligence—Evidence—Appeal and Error.**

Where the trial judge directs the jury to find for the plaintiff if they believe the evidence, the whole evidence should be considered in the light most favorable to the defendant; and though it may appear from the examination, in part, of defendant's own witnesses, that the instruction may have been correct, it will be held for error if taking the evidence as a whole there was sufficient to constitute the defense relied on by him.

ALLEN, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

APPEAL from *Carter, J.*, at January Term, 1913, of PENDER.

Civil action to recover damages for wrongful injuries to the person.

The evidence of plaintiff tended to show that on 7 March, 1910, he was a passenger on defendant's train, having purchased and (574) holding a ticket from Wilmington, N. C., to Rocky Point. That after the conductor had taken up plaintiff's ticket, plaintiff went forward to the smoker, and was again forced to pay his fare under threat of being ejected from the train, the conductor insisting that no ticket or fare had been collected from plaintiff. That after a verbal altercation, the conductor left the car and when the train stopped at Rocky Point, plaintiff'ss destination, and as he was endeavoring to alight, having some bundles in one arm, and when he stepped down on the platform, he was seized by the baggageman, the porter, and another, and searched by the conductor. That plaintiff was then turned loose, (575) and in the quarrel that ensued the conductor called plaintiff a liar, plaintiff said, "You are another," and he was then knocked down and beaten and injured by the conductor, to his great damage.

There was evidence offered by defendant in denial of plaintiff's right to recover, and on issues submitted the following verdict was rendered:

1. Did defendant company, through its employees, assault and beat the plaintiff, as is alleged in the complaint? Answer: Yes.

2. Had the plaintiff's contract of carriage ended before he was assaulted? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: Five thousand dollars ($5,000).

On the first issue the court charged the jury as follows:

"First. Did the defendant company, through its employees, assault and beat the plaintiff, as alleged in the complaint? It is not denied that upon the instant of the plaintiff leaving the train he was seized and held by authority and under the directions of the conductor for a space of a few seconds at least, and that while being so held his person was searched by the conductor by his feeling on the outside of the pockets of the plaintiff; and since in the opinion of the court the evidence fails to disclose any legal justification for the seizure of the plaintiff's person and the search made at that time, the court instructs the jury that if they believe the evidence they will answer the first issue 'Yes.'" Defendant excepted.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

R. G. Grady and Herbert McClammy for plaintiff.

Davis & Davis, J. T. Bland, H. L. Stevens, and K. O. Burgwyn for defendant.

HOKE, J. It has been repeatedly held that on motion to nonsuit the evidence which makes for defendant's justification or defense must be taken as true and interpreted in the light most favorable to (576) him. *Deppe v. R. R.*, 152 N. C., 79; *Cotton v. R. R.*, 149 N. C., 229. The same rule is properly applied to a charge, "if the evidence is believed" or if the facts are as testified to, etc., and operates in favor of any litigant whose rights are adversely affected, whether plaintiff or defendant. Applying the principle, while the testimony of plaintiff, if accepted by the jury, clearly established an actionable wrong on the part of the conductor and employees, for which the defendant is responsible (*Stanley v. R. R.*, 160 N. C., 323; *Berry v. R. R.*, 155 N. C., 287, and *Hutchinson v. R. R.*, 140 N. C., 123), we think there was error in the portion of his Honor's charge above excepted to, and upon this feature of the case and also on the entire evidence the defendant is entitled to have the issue as to its liability referred to the decision of the jury.

Upon this question, a summary of the plaintiff's evidence has been heretofore given. On the part of the defendant, there was testimony tending to show that plaintiff had not given the conductor any ticket and failed and refused to exhibit one when asked for it, claiming that his ticket had been already taken up. That after discussing the matter, the conductor insisted on a ticket or payment of fare, and compelled the payment of the cash fare. That his manner was considerate and that of plaintiff was improper, and that he showed signs of being under the influence of whiskey; that when plaintiff paid the money to the conductor he told him that he would get even with him at Rocky Point, two of the passengers testifying that he said this with an oath; that when the conductor left the car after having told the plaintiff he would have to pay or be put off, or after he had paid, two passengers testified that they saw plaintiff move something from his hip pocket to the front pocket of his coat, and that the witness took it to be a pistol; that the witness informed conductor that he had better be careful and that he had seen plaintiff put a pistol in his coat pocket; that the conductor thanked him, and, going forward to the baggage car, told the baggageman about it, and asked him to come out and watch for him while he assisted the passengers in getting off; that this was done, and as plaintiff came down the steps some of the (577) passengers called out, "Look out for that fellow; he has got a pistol," and as he got off the train the baggageman seized and held him, and when the passengers were helped off, the conductor went to him and searched him by putting his hand over the outside of plaintiff's pockets, and, finding nothing, told the baggageman he had nothing, to

turn him loose, and signaled the train forward; that as it moved away, plaintiff made an assault on the conductor, struck him and kicked him, and the conductor struck him back, and in the fight knocked plaintiff down. The officer's own evidence as to what occurred after the fare was paid being as follows: "After we left the water tank at Castle Hayne he went in front of the platform in the door and commenced smoking cigarettes, and I told Brown it was objectionable to smoke there; to come back in the car; that it was against the rules to ride on the platform of the car. Brown said, 'You have too much to say.' I told him I was sorry he took it that way. Brown said, 'Well, that's all right; you made me pay my fare; damn you, I will fix you when I get to Rocky Point to-night.' I said, 'All right.' I then said, 'If you use any more profanity in the car (my wife was within a few feet of him, and several other ladies), you won't go to Rocky Point,' and I then passed on. Just before getting to Rocky Point, I went to my baggage master myself and told him a fellow back there said he was going to fix me when I got to Rocky Point, so I would rather not have any trouble with him; that I did not care to hurt him while I am assisting passengers off, and 'I would be glad if you would put on your civilian coat and hat and come and watch out for me,' and he did it; and as the passengers started disembarking, several of them run out and said, 'Look out for that fellow; he has got a pistol,' and he jumped off the train and Johnson grabbed him and held him until I assisted the passengers off, and I went to him and searched him, and I did it for the safety of myself and the other passengers around. In searching, I simply put my hands over his pockets on the outside and slapped them. I said, 'He has no pistol; turn him loose,' and I signed the train ahead, and the train started, and as I got out he rushed up and hit me, and I turned around to defend myself. He was close by and I simply shoved him off and said, 'You go on; I don't want to have any trouble with you.' (578) Brown said he would go nowhere, 'You damn scoundrel, you made me pay my fare,' and he then knocked my cap off about 10 feet and came back at me a second time. I had a lantern (I only have one hand that I can use), and he came back at me with a rush and kicked me and tried to hit me again. I defended myself, and he kept right on fighting, and I finally got one lick at him and knocked him down and got on the train and left. I hit him with my fist. I did not knock him down when I hit him with the lantern, nor break the lantern. The bottom fell out of the lantern and the porter picked it up and I used it from there to Rocky Mount."

Upon this and the other testimony relevant to the inquiry, we do not think that the trial court could properly tell the jury that if they

believed the evidence the defendant was in default by reason of having taken hold of the man and searched him as he descended from the car. It is earnestly urged for plaintiff that at the precise time he was seized by the company's employees, he was in the act of alighting from the car with a lot of bundles in one arm and that he was making no hostile demonstration towards any one and was not in a position to do so, and that one cannot justify an assault upon another with intent to injure him by reason of mere rumors or reports, without more; there must be some overt demonstration amounting to a present menace. As a general or abstract proposition, this may be true; but it does not correctly state the case presented here.

A conductor of a railroad train is charged with the duty of properly looking after and protecting his passengers, and is held to a high degree of care in this respect. *Penny v. R. R.*, 133 N. C., 221; *S. c.*, 153 N. C., 296. So important is it considered that in the performance of this duty he is clothed to some extent with the powers of a peace officer (Pell's Revisal, 2604a), and if he fails to act in proper instances, and injury results, his very failure may be imputed to the company for wrong. And by reason of these exigent duties, and also of his right in emergencies to protect himself, a right present in negligence as (579) well as in other cases (*Laidlaw v. Sage*, 158 N. Y., p. 73), a conductor is not always required to await developments or remain inactive until there is some overt act importing a present physical menace either to himself or his passengers; but, in view of all the facts known or as they reasonably appeared to him, he may at times interfere to prevent or forestall violence. *Berry v. R. R., supra;* 2 Hutchinson on Carriers, secs. 978-970.

In the case as presented on this appeal, there was no assault on the plaintiff as he alighted from the train with intent to harm him; he was at that time only seized and held until the conductor could search him, which he did by "feeling or slapping on the outside of plaintiff's pockets," followed by an immediate direction to turn him loose, and, restricting our decision to the facts embodied in the portion of the charge excepted to, and without prejudice to the other features of the evidence which may tend to inculpate or excuse the company, we are of opinion that plaintiff is entitled to have the case in this aspect submitted to the jury, to determine whether the conductor, under the principles stated and in view of all the facts as they reasonably appeared to him, was in their opinion justified in seizing and searching the plaintiff as he alighted from the train.

No doubt a contrary view could very well be maintained by referring to plaintiff's evidence or even to the cross-examination of the defendant's

witnesses, and accepting that as the correct version; but, under our authorities, this is not permissible here. As said in *Dale v. Taylor,* referring to a cross-examination of plaintiff's witness, and in which he had qualified his statement as made in chief: "True, the witness seems subsequently to have qualified his statement, but we are not at liberty to select the more favorable portion of a witness's statement and act on it for defendant's benefit. In a motion of this kind, we have repeatedly held that the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable to him," and, as stated by the same principle defendants cause is entitled to the same treatment. For the error indicated the defendant is entitled to have his cause tried before another jury, and it is so ordered.

New trial. (580)

ALLEN, J., dissenting: If the evidence is considered in the light most favorable to the defendant, I think his Honor was justified in charging the jury that, in any aspect of it, the conductor was guilty of an assault.

It may be that the plaintiff had said he would fix the conductor when he reached Rocky Point, and that some one had told the conductor he had a pistol, but the fact is that he had no pistol, and that he was leaving the car quietly, making no demonstration, when he was seized by two employees of the defendant after he reached the ground, and searched by another.

The two employees had been stationed at the place where passengers alighted, for the purpose of watching the plaintiff, and, upon the slightest demonstration, could have stopped him; but, acting under the orders of the conductor, they preferred not to wait until there was necessity for action.

The conductor, who testified most favorably for the defendant, said, among other things:

Q. You saw Brown when he was getting off? A. He didn't come down the steps I was on.

Q. You stood there, and didn't you see him? A. Yes, sir; saw him when they made the alarm.

Q. He was not doing anything but moving along quietly? A. That's all I saw him do.

Q. He had bundles in his hands? A. I think he had one bundle, one armful.

G. Got off the train quietly and peacefully? A. I can't swear what he was doing before.

Q. From your observation, was he doing or saying anything? A. Not at that time.

Q. I ask you, captain, if this man did anything in this world to you—attempt to strike you or offer any violence to you at all—until after you placed him under arrest? A. He had not attempted; no.

I do not believe it can be law that three employees of the defendant can seize and search an unarmed passenger as he is leaving the
(581) train, quietly and peaceably, without threat or demonstration, and not be guilty of an assault, and these are the facts as I read the evidence.

CLARK, C. J., concurs in the dissent.

HENRY BARNES, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 April, 1913.)

1. Railroads—Negligence—Principal and Agent—Scope of Agent's Authority—Declaration—Rumors—Hearsay Evidence.

Where a railroad company is sued for the negligent killing of plaintiff's intestate, a fireman on defendant's train, owing to an alleged negligent defect in defendant's waterspout he was required to use in filling the locomotive with water, declarations of a station hand as to the condition of the spout, in plaintiff's favor, are not within the scope of the declarant's agency, and inadmissible as hearsay; likewise, rumors in the neighborhood to that effect, the latter being of less probative force than the former.

2. Evidence—Instructions—Testimony of One Witness—Appeal and Error.

Where damages are sought of a railroad company for negligence failing to supply its fireman with a proper appliance for his work, resulting in injury, and only one witness, defendant's engineer, had testified to a certain state of facts bearing thereon, a charge of the court that if the jury believed the injury occurred as one of the engineers said it did, particularizing the testimony, to answer the issue of contributory negligence "Yes," is not objectionable as singling out the evidence of one witness for the instruction, the instruction being upon the only evidence offered on that phase and pointed out to the jury by giving the name of the witness testifying thereto.

APPEAL by plaintiff from *Webb, J.*, at September Term, 1912, of ROBESON.

These issues were submitted:

1. Was the death of the plaintiff's intestate caused by the negli-
(582) gence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff's intestate by his own negligence contribute to his injury, as alleged in the answer?

3. What damage, if any, is the plaintiff entitled to recover of the defendant on account of the alleged injury?

Plaintiff appealed.

McNeill & McNeill for plaintiff.
McLean, Varser & McLean for defendant.

BROWN, J. Plaintiff's intestate, John Stafford, was a fireman in the employ of defendant. He was killed at a water tank near Pembroke on defendant's railway. Plaintiff contends that the waterspout was broken and defective, and, because of its defective condition, suddenly broke from its attachments and struck Stafford and killed him. The defendant contends that Stafford went out on the tender to fill it from the spout, lost his balance accidentally, fell and was killed; that the spout and attachments were in good condition and not defective. The jury so found, and answered the first issue "No."

The plaintiff offered the declarations of Fulton Carter concerning this matter and proposed to prove them by Williams Lowrie. They were properly excluded. Carter was a station hand, and the alleged declarations were not within the scope of his authority. They are hearsay in every sense. *Lytton v. Manufacturing Co.*, 157 N. C., 331; *Younce v. Lumber Co.*, 155 N. C., 241; *Rumbough v. Improvement Co.*, 112 N. C., 751.

The plaintiff offered to prove that the condition of the tank "got to be a subject of neighborhood comment." A rumor is inferior in probative quality to hearsay, and is incompetent as evidence to establish a fact. *Hopkins v. Hopkins*, 132 N. C., 25; *Starkweather v. Benjamin*, 32 Mich., 305; 16 Cyc., 1213.

The plaintiff excepts to the following extract from the charge: "If you find that it occurred in the way and manner one of the engineers said it occurred, that he went up on the tank and the spout was hanging up in its proper condition after the man fell; if you find that plaintiff's intestate was standing on the tender and the chain got (583) caught, and the engineer told him to unloose the chain, and while he unloosed the chain he fell, slipped and fell to the ground, the court charges you that it would be your duty to answer the first issue 'No' and to answer the second issue 'Yes.'"

It is contended by plaintiff that his Honor in this portion of his charge singled out one witness, and told the jury if they believed this witness to find for the defendant.

We do not think the charge is such an infraction of the rule as to warrant a new trial. The charge merely states the facts and recites them to the jury, and instructed them substantially to answer the first issue "No," if they so found the facts.

A reference to the witness as one of the engineers, without calling his name, and he the only one who testified to these especial facts, could not well have had any prejudical effect upon the minds of the jury.

His Honor had already fully and clearly stated all the contentions and evidence relied upon by the plaintiff.

Upon a perusal of the evidence and the entire charge of the court, we fail to find any substantial error. The learned judge who tried the case below seems to have been lenient to the plaintiff in the admission of evidence and in his charge to the jury. He not only stated at length the contentions of the plaintiff in their strongest light, but gave to the plaintiff an unusually exhaustive and fair charge upon the law bearing upon the issues.

The case seems to have turned entirely upon the condition of the tank, and involved solely an issue of fact.

The plaintiff offered evidence tending to prove that the spout was defective. The defendant introduced ten witnesses who testified that they used the spout shortly after the accident, and that it was not defective in any particular. This question was fairly presented to the jury and resolved in favor of the defendant. We find

No error.

Cited: *Morgan v. Benefit Society,* 167 N. C., 266.

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(584)

J. I. CASE THRESHING MACHINE COMPANY v. J. W. MCKAY.

(Filed 2 April, 1913.)

1. Written Contracts—False Warranty—Fraud—Parol Evidence.

The defense of false warranty in a written contract of sale requires that the party relying thereon, being bound by the terms of the warranty, must have complied with them in order to recover; but this principle does not obtain where the contract itself is attacked for fraud in the procurement, for if the fraud is established, the contract is void, and hence parol evidence is admissible to establish the fraud, and is not restricted by the written words of the contract, under the principle that they may not be varied by parol.

2. Same—Principal and Agent.

Where in a written contract of sale of goods made by an agent there is a provision limiting the authority of the agent to make representations respecting the goods, and the defense is established by the purchaser that the contract itself was obtained by the agent's fraud, the principal is bound by the representations made by the agent, though contradictory of the writing.

3. Written Contract—Fraud—Parol Evidence—Burden of Proof.

Where the purchaser of goods seeks to avoid a contract of sale made by the agent of the seller, for fraud of the agent in procuring the contract, he must show (1) that the representations relied on were made by the agent; (2) that the agent knew they were untrue, and made them with intent to deceive; (3) and that he acted in reliance thereon in making the purchase.

4. Same—Principal and Agent—Evidence, Sufficient.

Upon the question of fraud in procuring the sale of a traction engine by plaintiff's agent from the defendant, there was evidence in behalf of the defendant tending to show that the agent represented that the engine would haul a certain amount of lumber a day; that it would decrease the cost of defendant in hauling his lumber; that the engine was constantly breaking down and would not haul the quantity of lumber as represented by the agent that it would; that the agent knew that his representations were false, as evidenced by his saying the engine was worn out before it was delivered; and it is *Held*, that the evidence was sufficient to be submitted to the jury upon the question of plaintiff's fraud, which, if the jury found to be true, would vitiate the written contract of sale.

5. Same—Acceptance—Plea in Bar.

Where a contract for the sale of a traction engine has been procured by fraudulent representations which vitiate the contract of sale, and it appears that the purchaser, before he has had opportunity to test the engine, was induced by the agent of the seller to accept it and make a payment thereon, under the assurance that the contract would not bind him if the engine was not as represented, the acceptance, under such conditions, does not bar the purchaser of his defense in an action by the seller to recover the contract price.

6. Same—Fraud and Mistake—"Satisfaction Slip."

Where the purchaser of a traction engine has established fraud in the procurement of the contract of sale sufficient to vitiate the contract, and has been induced to accept the engine, make a payment on the purchase price and give his notes for the balance thereof upon the false assurance of the seller's agents that it would accomplish certain purposes for which it was bought, and there is evidence that the purchaser signed what is called a "satisfaction slip" at the time he signed the notes, reasonably mistaking it for one of the notes, and in an action to recover upon the notes this "satisfaction slip" is relied on as a bar to the defense of fraud, and there is further evidence that the purchaser, as soon as he reasonably could find out that the engine was not as rep-

resented, notified the seller thereof and held the engine subject to his disposition, it is *Held* that it was for the jury to decide whether or not the defendant signed the "satisfaction slip" under a mistake, and if he did it would not bar his right of rescission upon the ground of fraud in the purchase; and *Held further*, that the "satisfaction slip" relied on in this case only amounted to an expression that the defendant was pleased with his purchase before he reasonably could have discovered its worthless character.

(585) APPEAL by plaintiff from *Webb, J.*, at September Term, 1912, of ROBESON.

The following issues were submitted:

1. Did the defendant execute the contract, notes, and mortgages alleged in the complaint? Answer: Yes.

2. Did the defendant accept, the engine and fixtures after demonstration and inspection of same by him, as alleged in the complaint? Answer: No.

3. Were the said notes, contract, and mortgage procured from defendant by false and fraudulent representations of the plaintiff's agent, as alleged in the answer? Answer: Yes.

4. Is the defendant indebted to the plaintiff, and if so, in (586) what amount? Answer: Nothing.

5. In what amount, if anything, is the plaintiff indebted the defendant on account of money paid on the machinery to the plaintiff by the defendant? Answer: $500, with interest.

6. In what amount, if anything, is plaintiff indebted to the defendant for expenses incurred in the endeavor to operate the machinery and other expenses incurred in connection with said machinery, as alleged in the counterclaim of defendant as set forth in the answer? Answer: $231.

From the judgment rendered, the plaintiff appealed.

W. D. Turner, Dorman Thompson for plaintiff.

McLean, Varser & McLean, McIntyre, Lawrence & Proctor for defendant.

BROWN, J. This action is brought to recover on notes of defendant aggregating $1,774, given for the purchase of a traction engine sold to defendant by plaintiff's agent, one Crutchfield.

The defendant for answer sets up two defenses: First, that the plaintiff warranted the quality and suitableness of the engine for the purposes intended, and avers a breach of said warranty; second, that defendant was induced to enter into said contract by reason of the false and fraudulent representations of Crutchfield, the selling agent of plaintiff.

The defendant appears to have relied solely upon the last named de-

fense, and as no issue was submitted upon the question of false warranty, we will not consider that aspect of the case.

There is this difference: A party relying upon a written warranty of quality in the sale of personal property is bound by the terms of the warranty, and must comply with them in order to recover. *Piano Co. v. Kennedy,* 152 N. C., 196. Whereas the defense of fraudulent representations, whereby one is induced to enter into a contract, is not founded on the contract, but, when established, vitiates and destroys it, and the restrictive stipulations contained in the contract fall with it. For this reason the contention of the plaintiff that much of the evidence tends to vary the written contract cannot be sustained. (587)

The case of *Etheridge v. Palin,* 72 N. C., 216, has no application. In that case the attempt was to vary the contract of warranty.

The defense of fraud does not change the contract, but nullifies it, and is competent for that purpose, as held in *Tyson v. Jones,* 150 N. C., 181; *Whitehurst v. Insurance Co.,* 149 N. C., 273.

In *Tyson v. Jones* it was held that false and fraudulent representations sufficient to avoid a written contract may be shown by parol as a defense in an action for damages alleged to have been sustained by its breach, as such does not tend to vary or contradict the writing, but to render the entire instrument void.

To same effect, *Bank v. Chase,* 151 N. C., 108; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Gwaltney v. Insurance Co.,* 132 N. C., 928; *Insurance Co. v. Knight,* 160 N. C., 592.

It is contended that the contract contains a clause limiting the authority of the selling agent, and that McKay, being able to read, is fixed with knowledge of such clause.

This position might be well taken if the defense was based upon the contract, but it is well settled that a clause in a sale contract exempting the seller from liability for its agent's representations at variance with the contract, does not protect the seller where the contract was void by reason of the agent's fraud. *Machine Co. v. Bullock, ante,* 1.

In *Unitype Co. v. Ashcraft,* 155 N. C., 63, it was said: "The declarations made by the agent were made by him *dum fervet opus,* and his principal must be considered as bound by them as much so as if it had made them itself."

As said in *Peebles v. Guano Co.,* 77 N. C., 233, "A corporation can only act through its agents, and must be responsible for their acts. If a manufacturing corporation is not responsible for the false and fraudulent representations of its agents those who deal with it will be practically without redress, and the corporation can commit fraud with impunity." *Manufacturing Co. v. Davis,* 147 N. C., 267; *Food Co. v.*

Elliott, 151 N. C., 393; *Manufacturing Co. v. Feezer*, 152
(588) N. C., 516.

Several prayers for instruction bring up for review the sufficiency of the evidence of fraud.

To justify a finding for the defendant upon the third issue, relating to the fraudulent representations of Crutchfield, the agent of plaintiff, the evidence must tend to prove: (1) That the representations were made; (2) that the agent knew they were untrue, and made them with intent to deceive; (3) that the defendant acted in reliance thereon in purchasing the engine.

We think there is sufficient evidence to be submitted to the jury upon each of these three elements of fraud.

The representations are established not only by the evidence of the defendant, but by that of Crutchfield himself, who testified as follows:

"I was salesman and expert for company; went around selling machines; it was usual to demonstrate their qualities; McKay told me he wanted an engine to haul lumber, and showed me road and said he wanted to haul from 4,000 to 5,000 feet at a load and make two trips a day; if he could get an engine that would do that, he wanted it. He said it cost him $1.50 to haul with wagons, and wanted engine to reduce cost.

"I told McKay I thought that engine could haul 5,000 feet and make two trips per day. I told him this more than once. I told him that it would haul from 4,000 to 5,000 feet and make two trips per day under ordinary conditions of weather and roads, if he would make improvements on road. I thought engine would do what he wanted it to do. I told him so. The only thing he told me he wanted to do was to reduce hauling expenses. After it would not work, we talked about it, and I told him I thought it would do it."

The defendant testified: "I told him I would buy an engine if it would reduce the cost of hauling sufficient to justify it; told him it was costing me $1.50 per thousand; showed him the road; he told me if I bought this engine I could reduce cost considerably; that it would not cost more than $4 per day to operate it and could make two trips a day and easily carry 5,000 feet at a trip. . . . I would not have bought the engine but for those representations. I told Crutch-
(589) field repeatedly that I would have to rely upon what he said about it. I had had no experience in operating traction engines. . . . He said he guaranteed that it would haul 10,000 feet a day and make two trips per day and would improve the road in running over it."

B. F. Faircloth testified: "Crutchfield said to McKay he could haul two trips and make 5,000 feet a trip in one day."

Jasper Bullock testified: "Crutchfield told him he would guarantee it would give satisfaction; that it would make two trips and haul 5,000 feet in a day; that he would guarantee it."

R. T. Cobb testified: "Crutchfield said it would haul 5,000 feet and make two loads a day. He said he would guarantee it, and if it did not, it was not McKay's engine."

D. F. Hester testified: "McKay told Crutchfield he wanted an engine that would haul 5,000 feet at a load and make two loads a day. Crutchfield said that the engine would do that; that he would guarantee it."

D. F. McCormick testified: "Heard Crutchfield say damned old thing was worn out before it came here; ought to have been on scrap pile."

There is abundant evidence tending to prove the falsity of Crutchfield's declarations; that the engine utterly failed to come up to the representations; that although handled by men pronounced competent by the agent himself, and although the road was properly repaired and weather was good, it never averaged even one trip a day or even 1,500 feet of lumber. Instead of decreasing the cost below $1.50 per thousand, it increased the cost to $10.44 per thousand, not counting the cost of the engine.

In addition to this, in hauling 20 loads, it constantly broke down; the hubs broke; several spokes came out; cog gearing slipped and broke; clutch broke; gearing broke, etc. McKay spent over $150 in repairs in trying to operate it. It was never made to work, and after faithful trial was abandoned and plaintiff was notified to remove it.

That Crutchfield knew of the worthless character of the engine before he shipped it to the defendant is shown by his statement (590) to McCormick, quoted above.

The plaintiff further contends that the defendant accepted the engine after demonstration by Crutchfield, and that such acceptance is a bar to his defense.

The plaintiff's evidence tends to prove that after Crutchfield had demonstrated the engine five days, the defendant then signed the written contract, Exhibit "A," paid Crutchfield $500 in cash and signed the notes and mortgage. At same time McKay also signed the "satisfaction slip" reading as follows:

HAMER, S. C., 11 April, 1906.

J. I. CASE THRESHING MACHINE COMPANY,
Racine, Wis.

GENTLEMEN:—Your Mr. J. T. Crutchfield has rendered us the desired assistance in operating the machinery recently purchased from you, and we are well pleased with the same. Engine No. 16013.

J. W. MCKAY.

The defendant's evidence tends to prove that the engine was operated three days before contract was signed. It did not come up to representations. It was admitted that it rained constantly during that time; that the roads had not been repaired and were in very bad condition. Plaintiff's agent had to leave, and insisted that the contract be signed. Defendant refused to do so. The agent then assured defendant that the failure of engine to come up to representations was due to the weather and roads, and guaranteed that it would come up to representations in good weather when the road had been repaired.

He further agreed that if it did not do so, the contract and notes should be returned to defendant and the trade canceled. Defendant told the agent he had no way of knowing what it would do, but that he would sign the contract upon the guarantee that if, in good weather and after repairing the roads, the engine failed to come up to specifications, the notes and contract were to be returned to him and the trade canceled.

We do not think the court would have been justified in hold-
(591) ing as a matter of law that there was a final and unconditional acceptance of the engine after examination by defendant himself.

Defendant testified that he told plaintiff's agent when he signed the notes and slip that he knew nothing about that character of engines, and that he relied upon his representations and judgment.

According to defendant's version of the matter, if he accepted the engine, he did it relying upon Crutchfield's representations, and not upon his own examination.

But even if defendant was under obligations to make an examination for himself before signing the contract, plaintiff cannot set up his failure to do so in excuse of the fraud of its agent. *Machine Co. v. Bullock, ante,* 1.

See also *Griffith v. Lumber Co.,* 140 N. C., 514; *Hill v. Brown,* 76 N. C., 125; *Leonard v. Power Co.,* 155 N. C., 15.

As to the "satisfaction slip," the contention of plaintiff that the signing of it bars defendant's defense cannot be maintained.

There was evidence that this slip was of same size and character as the notes; that they were spread out on a table shingle fashion; that the defendant was told there were the notes, and he signed under this apprehension.

His Honor submitted this to the jury under instructions that if defendant knew what he was signing he was bound thereby; but that if, upon the contrary, he signed the paper under a belief that it was a note, then he would not be bound thereby.

We do not think the plaintiff can justly complain of his Honor's ruling in respect to this so-called "satisfaction slip." In our opinion,

it amounts to nothing more than an expression that the defendant was pleased with the engine at that time, only a few days after its arrival. He had not then discovered its worthless character, and that, as Crutchfield told McCormick, "It ought to have been on the scrap pile."

It is contended that defendant retained the engine and tried to work it for such a length of time as precludes him from rescinding the contract upon any ground.

It was in evidence that as soon as defendant ascertained the engine would not haul the quantity of lumber represented, even (592) after the road was repaired and the weather cleared off, he at once wrote the company. They sent a man to put it in shape. This effort failed.

The defendant then (as suggested by plaintiff) ordered certain new parts and renewed the attempt to make it operate successfully. This being a failure, plaintiff's agent invited defendant to Greensboro for a conference.

As long as a year after the execution of the notes, defendant agreed to pay them, provided the engine could be made to come up to representations.

When he finally ascertained that it was absolutely impossible to make the engine perform the services, he put it aside and has not used it since.

He made in all not more than twenty trips with it. He tendered it back promptly to plaintiff. Defendant, having retained the engine under these circumstances, at the request of plaintiff, trying to make it perform the service it was represented as capable of performing, is not barred from asserting his right of rescission upon the ground of fraud in the purchase.

There are fifty-four assignments of error in this record. We have examined them and find them to be without merit. We content ourselves with reviewing the salient points of the case.

No error.

Cited: *Guano Co. v. Live Stock Co.*, 168 N. C., 447.

(593)

A. E. CAIN v. J. H. DOWNING.

(Filed 26 March, 1913.)

1. **State's Lands—Entry—Vagueness of Description—Protestant's Rights—Pleadings—Interpretation of Statutes.**

Where a protestant against an entry of State's lands seeks to show that the entry protested against is void for insufficiency of description of the lands sought to be entered, he denies the existence of the very fact which constitutes the essential basis of his protest, that the entry covers lands belonging to him, which the State had no right to grant, having parted with the title. Revisal, sec. 1709.

2. **State's Lands—Entry—Vagueness of Description—Valid as to State—Subsequent Entry—Survey.**

An entry on the State's vacant and unappropriated land is not void for vagueness of description of the lands entered as between the enterer and the State, and an indefinite description may be cured by a subsequent survey, the entry being valid so long as there is no subsequent entry made, which will entitle another to challenge the right of the enterer.

3. **Same—Notice to Second Enterer.**

The requirement that an entry on the State's vacant and unappropriated land describe the lands entered with sufficient definiteness, is to give a second enterer notice of what lands have been entered; and as between the State and the enterer, the entry is not void for vagueness in description, for it may be cured by a subsequent survey. Hence, a second enterer may not complain of a first entry being vague in its description of the lands, when he makes his entry after a survey has been made by the first enterer sufficient in its description.

4. **State's Lands—Entry—Vagueness of Description—Protestant's Title.**

A protestant against an entry on the State's vacant and unappropriated lands cannot contest the entry for vagueness of the description of the land without in some way showing some right or title therein in himself, for as between the State and the enterer the entry is valid, notwithstanding the vagueness in the description.

5. **State's Lands—Entry—Description — Substantial Compliance — Notice—Parol Evidence—Interpretation of Statutes.**

Where an entry on the State's lands describes the lands entered as a certain tract of land, being 200 acres near Colly Swamp, in Colly Township, and in and around Ditch Bay, adjoining the lands of D., M., O., and others, and being "a parcel or tract of land vacant, unappropriated, and subject to entry," the description is a substantial compliance with Revisal, 1707, and sufficient notice to a subsequent enterer that the lands have been previously appropriated; and it is error to exclude evidence tending to fit the lands to the description contained in the entry.

APPEAL from *Bragaw, J.*, at September Term, 1912, of BLADEN.

CAIN *v.* DOWNING.

This is a proceeding to protest an entry made by the defendant, (594) J. H. Downing, of a certain tract of land, said to contain 200 acres. The entry was expressed in these terms:

J. H. Downing produced to the undersigned entry taker a writing, signed by himself, that he lays claim and enters a certain parcel or tract of land vacant, unappropriated and subject to entry. The land is situate in Bladen County, Colly Swamp being the nearest water-course, being in Colly Township, in and around Ditch Bay. The lines of other persons are J. H. Downing, A. E. Martin, Kate Owens, and others. The number of acres claimed are 200. This entry was made 24 September, 1908.

WILLIAM WHITTED,
Entry Taker.

This entry was protested by the plaintiff, A. E. Cain, on 5 October, 1908, and an issue made up and sent to the Superior Court for trial. In that court the following proceedings were had: The protestant moved the court to dismiss the entry, on account of the insufficiency of the description in said entry to allow the enterer to proceed thereon with his proof. The enterer offered to prove that adjoining landowners mentioned in the entry entirely surrounded the land entered, and that this land is vacant and unappropriated, and that the land is near Ditch Bay and Colly Swamp, as set out in the entry; and the court, being of the opinion that the description in the entry is too vague and uncertain to be aided by parol proof or to allow proof to be introduced on the issues raised in the entry and protest filed, allows protestant's motion to dismiss, and the enterer excepted. Judgment was entered for the plaintiff, protestant, and the defendant, the enterer, appealed.

H. L. Lyon and Robinson & Lyon for plaintiff.
R. S. White and McLean, Varser & McLean for defendant.

WALKER, J. This case seems to have been considered in the court below by the protestant and the judge, in one aspect of it, as if it was a contest between parties holding senior and junior entries, in which case it must appear, in order to defeat the junior enterer who first takes out a grant, that he had notice of the prior entry, and the description of the land therein, for that reason, becomes very material. It (595) must be sufficiently accurate or specific to notify the junior enterer of the prior entry. But there is no such question in this proceeding. It was brought under Revisal, sec. 1709, which provides that "if any person shall claim title to or an interest in the land covered by an entry, or any part thereof, he shall file his protest in writing with the entry taker against the issuing of a warrant thereon," and then the

required issue is made up for trial in the Superior Court. It will be observed that the protestant must be a person who "claims title to or an interest in the land *covered* by the protested entry," whereas in this case the plaintiff, instead of admitting or alleging that the land is covered by the entry, is strenuously denying and combatting that very fact, by contending that the description in the entry is too vague and uncertain to cover or describe any land at all. The object of a protest, under this statute, was to prevent double or plural entries, or, in other words, the entry of land which was not vacant or not subject to entry, having already been appropriated, and is predicated, necessarily, upon the formal sufficiency of the entry. The protestant starts out by denying the existence of this very fact, which constitutes the essential basis of his protest, to wit, that the entry covers land belonging to him and which the State had no right to grant again, having already parted with its title. It was early said, in *Harris v. Ewing,* 21 N. C., 369, that an entry is not absolutely void in any case, merely because it is not as "special" as the party could have made it by the use of all the *indicia,* internal and external, supplied by the act as evidence of identity, but it is valid or invalid in respect of a subsequent enterer according to the fact that he may or may not have sustained loss by the want of particularity in it. "It is plain that it was not intended that the entry be so specific as entirely within itself to identify the land by its boundaries, because the same statute commands a survey to follow the entry at a short interval, and in the seventeenth section points out the means of identity to be set out in the certificate of survey. The truth is that the interest of the State, as vendor, was not at all concerned in the
(596) entry's being more or less special. The quantity was alone important to her, because that regulated the price. Again, the entry has never been considered in this State as a constituent part of the legal title, and for that reason such precision in its term is not necessary as will upon their face connect and identify the land granted with that entered. It appears to the Court, therefore, that a vague entry is not void as against the State, but gives the enterer an equity to call for the completion of his title by the public officers. If it be not void against the State, it is a necessary consequence, as we think, that it is likewise not so as against a subsequent purchaser from the State with notice. . . . We have before stated that the only purpose on which a special entry is preferred to a general and vague one is to give notice to a second enterer. If that be correct, the specific notice established in this case must supply the original defect in the entry. It is a defect which does not avoid it altogether, but only displaces it when otherwise it would prejudice the ignorant and the innocent." And this idea, that certainty

in the entry is required in order to protect innocent subsequent purchasers of the land from the State, that is, junior enterers, runs through all the cases upon the subject. *Johnstone v. Shelton,* 39 N. C., 85; *Munroe v. McCormick,* 41 N. C., 85; *Fuller v. Williams,* 45 N. C., 162; *Currie v. Gibson,* 57 N. C., 25; *Ashley v. Sumner,* 57 N. C., 123; *Grayson v. English,* 115 N. C., 358; *Fisher v. Owens,* 144 N. C., 649. It was said by *Judge Pearson* in *Munroe v. McCormick, supra,* and quoted with approval by *Judge Battle* in *Fuller v. Williams,* that "when one makes an entry so vague as not to identify the land, such entry does not amount to notice, and does not give any priority of right as against another individual, who makes an entry, has it surveyed, and takes out a grant. By a liberal construction of the law, such entries are not void as against the State. It is not material to the State what vacant land is granted." And *Justice Avery,* in *Grayson v. English, supra,* quoted approvingly what is said by *Chief Justice Ruffin* in *Harris v. Ewing, supra:* "It appears to the Court, therefore, that a vague entry is not void as against the State, but gives the enterer an equity to call for the completion of his title by the proper public officers." *Justice Con-* (597) *nor* said in *Fisher v. Owen, supra,* after referring to and quoting the language of the statute in regard to the description of land in an entry: "Does the description in the entry, under which plaintiff claims, comply with these requirements? It will be observed that we are not discussing the question whether the entry is sufficient, after survey is made and grant issued by the State, to vest the title. The State alone is interested in this question." So in *Ashley v. Sumner,* 57 N. C., 121, *Judge Pearson* again said that "it is the policy of the public to have the vacant land appropriated by individuals. So far as the State is concerned, it is a matter of indifference who appropriates the land, provided it be paid for. Upon this ground it is settled that where an entry is made in terms of general description, it may be made certain, and the particular land identified by a survey, if it be done before the right of another enterer has attached." All of which simply means that it is competent to lay what is called a "floating" entry in accordance with the established policy, and it is in itself valid as between the State and the enterer, for the State is indifferent as to what vacant land is taken up by entry, but the enterer takes the risk of his intended appropriation of public land being defeated, if he fails to identify it with certainty by a survey in such a way that others will have notice as to the location of the land described in the entry; but so long as there is no subsequent entry upon which to challenge his right, the first entry is perfectly valid. If an entry is void for uncertainty as against a subsequent enterer or purchaser from the State, it nevertheless is sufficient

to sustain a grant issued upon a definite location by a survey theretofore made which will be good as between the State and the grantee. *Lovin v. Carver*, 150 N. C., 710. After stating, in *Call v. Robinett*, 147 N. C., 617, that the vagueness of an entry may be cured by survey, under the statute, identifying the land, and notice thereof to a subsequent enterer, or what is equivalent thereto, the Court cites and quotes from *Currie v. Gibson*, 57 N. C., 25, as follows: "When the terms of description in which an entry is made are so vague as not to identify any lands, the entry is not void, and the defect may be cured by the survey, so
(598) as to make the grant which issues in pursuance thereof valid as against the State." And it is also good against every one who has not acquired a prior claim or right to the land, or an equity therein as a purchaser for value without notice of the prior entry. If, therefore, protestant or any one under whom he rightfully claims has received a grant for the land from the State, or has otherwise acquired the title as against the State, so that its right has been divested, that right or title will prevail against the enterer, even if he should hereafter survey the land and take out a grant therefor with a perfect description; and if he has such right or title, he may also protest the entry under the statute. But if he has no right or title to protect as against the entry, the latter is to be taken as valid, as the State does not contest it, and, as has been said, has no interest to do so. All the cases emphasize the distinction between an entry which is valid between the State and the enterer, and yet invalid as to a subsequent enterer without notice who first obtains a grant.

If the principles thus settled are applied to this case, the error of the court in adjudging the entry void on its face is apparent. The enterer offered to prove that the land could be located by the calls of the entry, and also that it is vacant land, being completely surrounded by the lands of the other proprietors named therein, but this was excluded, and, without any opportunity to locate his entry by a survey according to the statute, and without the least showing that the protestant has any interest in the land or any right to challenge the validity of the entry, the enterer was nonsuited. He was summarily dismissed from court without any chance to establish the facts by proof, if it was necessary for him to do so, in order to prevail against a plaintiff who had shown no title to the land or any interest whatever therein. But assuming, for the sake of discussion, that the whole burden rested upon him (*Walker v. Carpenter*, 144 N. C., 674; *Lumber Co. v. Coffey, ibid.*, 560), it was held in the later case of *Bowser v. Wescott*, 145 N. C., 56, that a protest, as authorized by the statute, Revisal, sec. 1709, "is a simple proceeding, under the entry laws, to ascertain if the enterer, *so far as the pro-*

testant only is concerned, has a right to enter the land described (599) in the entry." (Italics ours.) So far as the record in this case shows, the protestant has not only no shadow of title or claim to the land proposed to be entered and surveyed by defendant, and for which he will ask for a grant from the State, but he is not even an occupant of the land. But apart from this consideration, the enterer proposed to prove that the land was subject to entry, and that he was entitled to have it surveyed, and further, that it was accurately described in the entry; but was not permitted to do so. Can it be that an entry will be vacated upon such a showing? We think not. Besides all this, the land was sufficiently described and bounded so as, at least, to let in parol evidence for the purpose of identifying and locating it. It substantially complies with the directory provisions of the statute. Revisal, sec. 1707; *Harris v. Ewing,* 21 N. C., at pages 373, 374. But the land is described as being 200 acres, near Colly Swamp, in Colly Township and in and around Ditch Bay, adjoining the lands of J. H. Downing, A. E. Martin, Kate Owens, and others, and being "a parcel or tract of land vacant, unappropriated, and subject to entry." It would seem to be as definite as the descriptions held to be good in *Horton v. Cook,* 54 N. C., 270, and *Farmer v. Batts,* 83 N. C., 387. In *Horton v. Cook* the only certain element in the description was the "chestnut tree," the other calls being far more indefinite than those in this case. The land was described as lying "on the headwaters of Elk Creek and between the lands of other persons," but how far from them, or whether it touched them or not, did not appear. No course of distance was given. The description here is a certain tract of *vacant* land near Colly Swamp, in Colly Township, *in and around Ditch Bay,* adjoining the lands of several persons named, and others, containing 200 acres. It is possible that 200 acres of vacant land can be found answering that very description, and it may be that it is the only 200-acre tract of vacant land that does. It is quite as certain as the call for a physical object or point and thence running various courses (or any direction) for complement, as in the *Horton case.* When it is described as vacant and unappropriated land, it means land owned by the State at that place or not taken up by entry, which is as definite as if it had said the uncultivated land of a person named, which would have been sufficient, under *Farmer* (600) *v. Batts.* What is required by the law is not absolute certainty, but a description sufficient to be fitted to the thing intended to be designated. In the case of *Horton v. Cook,* 54 N. C., at p. 273, the Court said: "The objection to the vagueness and uncertainty of the defendant's entry, and its effect upon his rights, is equally against the plaintiff. Such an objection would have come with more force from

the plaintiff, to repel the allegation of notice of the defendant's entry, if he had obtained the first grant; but in truth, the defendant's entry was sufficiently definite and certain to fix the plaintiff with the actual notice which, it is clear from the proofs, he had of it. It specifies a certain tree, in a certain line of another tract of land, at which it commences; and it mentions the headwater of the creek on which, and the tracts of land belonging to other persons between which, it is located." There is no suggestion in this case that protestant is a subsequent enterer or has any interest that may be prejudiced if this entry is upheld.

The case seems to have been tried as if it were an ejectment or an action to settle conflicting titles, or to remove a cloud from plaintiff's title; whereas it is simply an attack upon an entry, which is valid as against the State and all others not having some interest or equity in the land in question, as we have already seen. If, as the case is now presented, we should hold this entry to be void for uncertainty, there would be no such thing as a "floating" or "shifting" entry, to be definitely located by a survey under the statute, and yet such entries have been distinctly recognized, as will appear by reference to the cases we have cited.

There was error in the ruling of the court.

Error.

Cited: *Walker v. Parker,* 169 N. C., 153.

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(601)

PHŒBY FULWOOD ET AL. v. JAMES B. FULWOOD ET AL.

(Filed 26 March, 1913.)

1. Wills—Devises—Latent Ambiguity—Extrinsic Evidence—Declarations of Testator.

A devise of the testator's "homestead tract" of land, when it appears that the buildings, outhouses, etc., where he had resided were on a tract containing 200 acres, but that he had acquired other adjoining tracts, from different persons at different times, presents a case of latent ambiguity, admitting extrinsic evidence to fit the description, and in this case, for that purpose, it was competent to show testator's declarations respecting it at the time of making the will, and at other times, his manner of dealing with the lands, etc.

2. Appeal and Error—Maps—Evidence Excluded—Materiality.

Where a map to the lands in controversy has not been sent up with the record, its exclusion by the court below will not be held for error,

for the appellate court cannot see its relevancy; but in any event its exclusion in this case was proper if it was because the surveyor had marked his conclusion instead of following the direction of the court in making it.

3. Wills—Devises — Latent Ambiguity — Evidence Excluded — Unanswered Question—Appeal and Error.

Where a devise of land, by its description, causes a latent ambiguity so as to admit of extrinsic evidence of its location or extent, the refusal of the trial court to allow witnesses to answer questions as to its boundaries or location, without statement as to what the answers would be, will not be held for error.

APPEAL by plaintiffs from *Bragaw, J.*, at September Special Term, 1912, of BRUNSWICK.

This is a proceeding for the partition of five tracts of land between the heirs of Benjamin Fulwood.

It was admitted at the trial that the said Fulwood acquired a 200-acre tract of land in 1875, which is not embraced in this proceeding; that he acquired the first and second tracts described in the petition in 1881, and the third tract in said petition in 1882, and the fourth and fifth tracts at some other time.

The first, second, and third of said tracts adjoin the 200-acre tract, on which was the home, outhouses, etc.

The said Benjamin Fulwood left a will, in which he devised "the homestead tract of land" to the defendant James B. Ful- (602) wood, subject to the life estate of the widow of Benjamin Fulwood.

The petitioners contended that "the homestead tract" included the 200-acre tract and no more, and the defendant contended that it included the 200-acre tract and the first, second, and third tracts described in the petition.

It was admitted that the plaintiffs and defendant were tenants in common of the fourth and fifth tracts.

There was a verdict in favor of the defendant, and the petitioners appealed from the judgment rendered thereon.

C. Ed. Taylor for plaintiffs.
Cranmer & Davis and Robert Ruark for defendant.

ALLEN, J. The description of the land devised to the defendant as "the homestead tract" presented the case of a latent ambiguity, as it was uncertain what land was intended to be included under that designation, after it appeared that the 200-acre tract and the first, second, and third tracts described in the petition were adjoining tracts, and that the

lands were acquired under different descriptioins, and at different times. *Sherrod v. Battle*, 154 N. C., 353. It was then permissible to introduce extrinsic evidence to fit the description, and for that purpose the declarations of the testator at the time of making the will and at other times, and his manner of dealing with the land, as by listing for taxation as one tract, were competent evidence. *Kincaid v. Lowe*, 62 N. C., 42; *McLeod v. Jones*, 159 N. C., 76.

The map is not sent up as a part of the record, and we cannot see that there was error in its exclusion. If, as may be inferred, the ruling of the court was because the surveyor had not followed the order under which he was acting, and had marked on the map his conclusions, his Honor properly refused to admit it as evidence. The other questions asked the surveyor are either as to irrelevant matters or the relevancy of the evidence offered does not appear to us.

The deeds introduced showed that the lands were conveyed to Benjamin Fulwood at different times and by different descriptions, and
(603) all the evidence was to the effect that the buildings were on the 200-acre tract.

When a witness is asked, "Is there a branch separating the 200 acre tract which you surveyed and Tract No. 1, which you surveyed?" "What separates Tract No. 3 from the 200-acre tract?" "What, if anything, in the nature of a natural boundary divides these two tracts from each other?" without other statement as to what would be the testimony of the witness, and as to its materiality, it is impossible for us to say there is prejudicial error.

The other exceptions require no discussion. The whole controversy was one of fact, which has been determined by a jury, and we find no error upon the trial.

No error.

Cited: Armfield v. R. R., 162 N. C., 29; *In re Smith*, 163 N. C., 467; *S. v. Smith*, 164 N. C., 479.

RICHMOND CEDAR WORKS v. J. L. ROPER LUMBER COMPANY.

(Filed 26 March, 1913.)

1. Appeal and Error—Removal of Causes.

An appeal lies from an order denying a motion for the removal of a cause to the proper county for trial.

2. Trespass—Timber Trees—Severance and Removal—Personal Property—Actions—Jurisdiction.

Where timber trees are severed from the lands of the owner by a trespasser, and carried away by him, the title to the trees is still in the owner, and he is entitled to all remedies which the law affords for the recovery of any other personal property or chattels wrongfully taken or detained.

3. Same—Damages to Lands.

The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespess *de bonis asportatis* for the value of the trees, both of which actions are transitory, or for trespess *quare clausum fregit*, which is local, and should be brought in the county where in the land is situated. Revisal, sec. 419.

4. Same—Removal of Causes—Pleadings—Interpretation of Statutes.

In this case the plaintiff alleged title to the *locus in quo*, and that the defendant "by its agents and employees entered upon said tract of land and cut and removed therefrom a large quantity of valuable timber trees standing and growing thereon, and converted the same to his own use, and it is held that the intent of the pleadings was to sue for a trespass on the land, and the allegation of a conversion was inserted in aggravation of damages; and therefore the refusal of the lower court, on motion properly made in due time, to remove the cause to the county in which the land was situated, was erroneous. Revisal, sec. 419.

5. Same—Causes Improperly Joined—Amendments—Practice.

An action for damages for trespass on land for the wrongful cutting and carrying away of timber trees, and also for their conversion, which require different places of trial, cannot be joined (Revisal, sec. 469); and where on appeal from a motion to remove the case, the pleading is ambiguous and both actions have been united, and the motion erroneously denied, the cause will be remanded so that the parties may amend or replead. Revisal, sec. 496.

6. Trespass—Damages to Lands—Severance and Removal of Trees—Nonresident Parties—Pleadings—Amendments—Jurisdiction.

Where a nonresident plaintiff sues to recover of a nonresident defendant the value of timber trees alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county

he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situate, that being the county wherein the cause of action arose (Revisal, sec. 423); and where this does not appear, it is proper for the court to allow an amendment to the complaint and to the affidavit upon which a motion to remove the cause is based, should the parties so desire.

7. **Motions—Venue—Parties—Misjoinder—Division of Action—Demurrer—Jurisdiction—Practice—Interpretation of Statutes.**

A motion to change the venue of an action must be made before a demurrer to the action may be filed for misjoinder of parties (Revisal, sec. 425); and where causes of action have been improperly joined, the court may order the action to be divided upon demurrer (Revisal, sec. 476), though triable in different counties.

8. **Removal of Cause—Misjoinder of Actions—Rights of Defendant—Venue—Mortgages.**

A plaintiff cannot deprive defendant of the right to have a local cause of action tried in the proper county, or change the venue to the prejudice of the defendant and against his will, by uniting two causes of action having different venues. This rule, however, does not apply to actions for foreclosure of mortgages.

9. **Deeds and Conveyances—Actions—Breach of Warranty—Ouster—Pleadings.**

In an action upon a breach of covenant in a deed, it must be shown that there has been an ouster or eviction under a superior title.

(605) APPEAL from *Ferguson, J.,* at September Term, 1912, of WAKE.

This action was brought in WAKE by the plaintiff, a nonresident corporation, against the defendant, also a nonresident corporation, and it is alleged in the complaint substantially:

1. That the defendant, on 14 December, 1885, conveyed to Albemarle and Pamlico Colonization Company, with covenant of warranty, a certain tract of land in the county of Tyrrell, in the State of North Carolina, and which is particularly described in the complaint.

2. That plaintiff has acquired all the right, title, and interest of the said Colonization Company by mesne conveyances.

3. That defendant, "by its agents, employees, and servants, entered upon said tract of land and cut and removed therefrom a large quantity of valuable timber trees standing and growing thereon, and converted the same to its own use, the value of the timber so cut and removed being more than $90,000."

4. That said cutting and removal was done in such a manner and with so little regard to the value of the young timber trees standing and growing on the land and to its effect upon the land itself, that the land and the freehold therein were greatly damaged as a result thereof, to the amount of $10,000.

5. That the deed of the defendant has been lost, and the registry thereof in Tyrrell County shows that no seal of the (606) grantor was affixed to his name subscribed thereto, whereas a seal was actually affixed to his name on the original deed.

Plaintiff also alleges a breach of the covenant of warranty by cutting and removing the trees and damaging the land, but there is no allegation of an eviction from the premises by any one under title paramount.

Defendant requested in due time that the case be removed for trial to the county of Tyrrell, alleging that to be its proper venue, and also asked for a removal upon the ground of the convenience of witnesses and readier access to the records of that county. The motion was denied. Defendant excepted and appealed.

Winston & Biggs for plaintiff.
Small, McLean & Bryan and R. N. Simms for defendant.

WALKER, J., after stating the case: That an appeal lies from an order denying a motion for the removal of a case to the proper county for trial has been thoroughly settled by repeated decisions of this Court. *Manufacturing Co. v. Brower,* 105 N. C., 440; *Connor v. Dillard,* 129 N. C., 50; *Brown v. Cogdell,* 136 N. C., 32; *Perry v. R. R.,* 153 N. C., 117. It is provided by Revisal, sec. 419, that actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest and for injuries to real property, must be tried in the county where the subject of the action, or some part thereof, is situated, "subject to the power of the court to change the place of trial in the cases provided by law." It is difficult to determine the exact nature of plaintiff's intended cause of action by the allegations of its complaint. The best we can make of it is, that the whole gravamen of its action is that the defendant unlawfully entered upon the land for the purpose of cutting down and removing the trees thereon, which were afterwards done. The allegations of the pleading are so blended as to render it impossible to separate any one or more of them from the others, and therefrom to frame a cause of action for a simple conversion of the timber which had been severed from the soil. The doctrine with respect to local and transitory (607) actions, where there has been a cutting of trees from land, is well stated in 40 Cyc., 75, with a copious citation of authorities to support the following text: "Although an action to recover damages for felling a tree upon plaintiff's land, or digging sand in it, or cutting down a telegraph pole fixed in its soil, is local, and may remain local even when the act of cutting down or digging is accompanied with an act of removal of the property from the land, defendant's wrongful act will

often result in giving plaintiff the option of suing in a transitory cause. When that which is upon the land and part of the realty has been severed from the soil and removed, it ceases to be part of the realty and becomes personal property. When the trespasser has sold the severed property and received money for it, plaintiff's cause, as a cause of *assumpsit* for money had and received, is admittedly transitory at common law. It is not the less transitory when asserted with direct reference to the thing severed, as a cause in detinue, or as a cause in trespass *de bonis asportatis,* or as a cause in trover and conversion. Nor is its transitory character affected by the fact that it is brought against the original trespasser, or that plaintiff's pleading alleges his ownership of the land, if the gravamen of the action is the conversion." When timber is cut from land, the title to it is unchanged. It belongs to the owner of the soil as before the act of severance, and he is entitled to all remedies which the law affords for the recovery of any other personal property or chattels, wrongfully taken or detained from its owner. *Halleck v. Mixer,* 16 Cal., 574; *Emerson v. Turner,* 95 Ark., 597, distinguishing *Jacks v. Moore,* 33 Ark., 31; *Buckley v. Dalbeare,* 7 Conn., 232; *McGonigle v. Atchison,* 33 Kan., 726; *Riley v. Boston Water Power Co.,* 11 Cush. (Mass.), 11; *Nelson v. Burt,* 15 Mass., 204; *Moore v. Wait,* 3 Wend. (N. Y.), 104; *Greeley v. Stilson,* 27 Mich., 153. Those cases not only state the general rule but clearly show the distinction between actions for injuries to the land or freehold and those for the simple and unmixed conversion of trees, growing corn, or cornstalks cut, or sand or earth dug therefrom and afterwards converted, not as a part of the act of cutting or digging, but as a separate and dis-
(608) tinct act in itself. Discussing the question in *Greely v. Stilson, supra,* and after stating that actions for trespass on land and injuries thereto are local, and that the testimony in an action for the trespass and one for the conversion of the timber or logs cut and carried away may be practically the same, the Court says: "A difference has been recognized, however, arising out of the fact that until the timber has become personalty, by being severed from the soil, it is not subject to conversion, and that whenever it may be moved in an unmanufactured form, whether in the same or in another county, a conversion may be charged as taking place where it is sold, or otherwise disposed of or appropriated, as well as on the first removal. Locating it as no longer freehold when it has become personalty, the law distinguishes actions for its conversion from those for the act whereby it became changed from realty, and puts all suits on a similar footing and makes them transitory. The distinction is technical, but it seems to be well established." But a further distinction has also been recognized by two courts of high authority, one having a code system like ours. In

Telegraph Co. v. Middleton, 80 N. Y., 408, defendant was sued for cutting down and converting telegraph poles, and it was said by the Court: "The telegraph poles, with the wires and attachments thereto, which, it is alleged, were cut down by the defendant, were affixed to the soil of a highway and constituted a part of the freehold. As they could not be cut down without an entry on the realty, and this constitutes a material part of the damages, the only action which can properly be brought is an action of trespass *quare clausum fregit.* This is clearly manifest; and as such action is local in its character, by the statute as well as by the common law, it will not lie in this State, where the land is located in another State. *Watts' Administrators v. Kinney,* 23 Wend., 484. In the case last cited it was held that although the courts will entertain actions which are in their nature transitory, notwithstanding they arise abroad, actions for trespass *quare clausum fregit,* ejectment, etc., where the land lies in a foreign country, cannot be tried here. It is claimed that the damage to the real estate is not the cause of action; and as the tortious acts were committed upon the highway where the defendant had a right to be, there could be no trespass on (609) the close. The answer to this position is that the plaintiff had affixed their poles to the realty, and the cutting away of the same was a trespass for which damages could only be recovered by an action *quare clausum fregit.* It is also insisted that the gravamen of the complaint was for carrying away and converting the poles which were severed, and were personal property after the cutting, even if they were a part of the realty previously. It is quite obvious that the cutting of the poles and the removal of them was one continuous and uninterrupted transaction, inseparably connected together, which constituted a single cause of action which cannot be divided into two actions—one for the cutting and another for the conversion. The one was a part of the other, and the conversion so coupled with the cutting that they were the same, and both of them are thus made local. *Howe v. Wilson,* 1 Den., 181." In *Ellenwood v. Chair Co.,* 158 U. S., 105, the allegations were much like those in this case, and the Court said: "The petition contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States,* 52 U. S., 11 How., 229 (13, 675); *Eames v. Prentice,* 8 Cush., 337; *Howe v. Wilson,* 1 Denio, 181; *Dodge v. Colby,* 108 N. Y., 445; *Merriman v. McCormick Harvesting Machine Co.,* 86 Wis., 142.

The entire cause of action was local." The Court said in *Emerson v. Turner, supra:* "In *Jacks v. Moore* the complaint alleged that the defendant entered upon the land and cut the timber growing thereon, and otherwise injured the same, to the plaintiff's damage $200. That was for a trespass upon the land and injury to it. But such is not the nature of this suit. It is simply a suit for the value of the timber, which appellee alleged belonged to him, and which his agent,
(610) appellant, had converted to his own use. There is no allegation that the land itself was injured or damaged, or that appellant had trespassed thereon in order to convert the timber." The action was properly held to be transitory, and not local to the county where the trees were cut from the land. Considering this question incidentally in *Williams v. Lumber Co.*, 154 N. C., 306, for the purpose of determining the rule for the measure of damages, *Justice Allen* said, at p. 309: "We think this conflict of authority probably had its origin in the different forms of action at common law, and (can be referred) to the distinctions between the actions of trover and conversion, trespass *de bonis asportatis* and trespass *quare clausum fregit*. If one entered upon the land of another and cut trees thereon, the owner of the land and of the trees had his election at common law to sue in trover and conversion or in trespass *de bonis asportatis* for the value of the trees, or in trespass *quare clausum fregit* for injury to the freehold, the land, or to the possession of it." After quoting this passage in *Brady v. Brady, ante,* 324, and directly referring thereto, the same learned justice said: "The first two of these actions are transitory, and the last local. If the owner elects to sue for the recovery of damages to the land, he must allege a trespass, but can waive the trespass, consider the trees as personalty after severance from the land, and sue for the wrongful conversion or wrongful carrying away of the trees, in which event he would recover their value. The reason the action *quare clausum fregit* is local is that the injury to the land can only be done on the land, and the other actions are transitory because the trees, after severance, may be carried away and converted elsewhere." He then quotes and comments upon what is said in *McGonigle v. Atchison, supra,* as to the different forms of action available to a plaintiff at common law, trespass *quare clausum fregit,* trespass *de bonis asportatis,* trover for the conversion of the severed product, detinue or replevin, and *assumpsit* for money had and received, if the trespasser had sold the property. There is another significant statement by the Court in that case which fully accords with our decisions, to this effect: "If the facts show a cause of action in the nature of trespass *de bonis asportatis,* or trover,
(611) then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit,*

then the action is admittedly local. . . . He (the plaintiff) seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the *value* of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit;* but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis,* and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory. All the old forms of action are abolished. We now have no action of trespass *quare clausum fregit,* nor of trespass *de bonis asportatis,* nor of trover; but only one form of action, called a civil action. And under such form of action all civil actions must be prosecuted; and all that is necessary in order to state a good cause of action under this form is to state the facts of the case in ordinary and concise language, without repetition. When the plaintiff has stated the facts of his case, he will be entitled to recover thereon just what such facts will authorize. We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election. And if one kind of relief is beyond the jurisdiction of the court, and the other within such jurisdiction, the plaintiff may elect to receive that kind of relief which is within the jurisdiction of the court. When the sand was severed from the real estate it became personal property, but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand, and had the right to follow it and reclaim it, into whatever jurisdiction it might be taken. He could recover it in action of replevin (*Richardson v. York,* 14 Me., 216; (612) *Harlan v. Harlan,* 15 Pa. St., 507; *Halleck v. Mixer,* 16 Cal., 574); or he could maintain an action in the nature of trespass *de bonis asportatis,* for damages for its unlawful removal (*Wadleigh v. Janvrin,* 41 N. H., 503, 520; *Bulkley v. Dolbeare,* 7 Conn., 232); or he could maintain an action in the nature of trover, for damages for its conversion, if it were in fact converted (*Tyson v. McGuineas,* 25 Wis., 656; *Whidden v. Seelye,* 40 Me., 247, 255, 256; *Riley v. Boston W. P. Co.,* 65 Mass., 11; *Nelson v. Burt,* 15 Mass., 204; *Forsyth v. Wells,* 41 Pa. St., 291; *Wright v. Guier,* 9 Watts, 172; *Moore v. Wait,* 3 Wend., 104); or he could maintain an action in the nature of *assumpsit* for

damages for money had and received, if the trespasser sold the property and received money therefor (*Powell v. Rees,* 7 Ad. & L., 426; *Whidden v. Seelye,* 40 Me., 255; *Halleck v. Mixer,* 16 Cal., 574)."

We may add that relief is now administered upon the allegations fairly, reasonably, and even liberally construed in aid of the pleader, without regard to the form of the prayer, or even if there is no prayer corresponding with the allegations, or one that misconceives the remedy. *Voorhees v. Porter,* 134 N. C., 591. But while technical accuracy is not demanded, we have not abolished all the rules of pleading, for the Code requires clearness and conciseness in the allegations, so as to evolve the real issue. If a plaintiff sues for one thing, we cannot give him another and different thing. *Blackmore v. Winders,* 144 N. C., 215. If he sues for a continuous injury to his land, we should not give him a judgment for anything not embraced by his allegations. If his pleading is ambiguous, it may be amended so as to make it certain. Revisal, sec. 496.

Testing the complaint in this case by these principles, we think plaintiff intended to sue for a trespass on its land in Tyrrell County, and the allegation of a conversion, as was said in *Ellenwood v. Chair Co., supra,* and *Telegraph Co. v. Middleton, supra,* was inserted in aggravation of damages. Sure it is that plaintiff does sue, at least in part, for a pure trespass and injury to the freehold, in so many words, and actions requiring different places of trial cannot be joined. Revisal, (613) sec. 469 (7). But if, by the most liberal construction, we can find an allegation, if properly made, upon which an action, in the nature of trover for a conversion of the trees, can be based, we should set aside the order of the court as erroneous and remand the case, so that the parties may amend or replead; and we believe this to be the just and safe course to pursue, and one at least in accord with the more modern and practical system of pleading and procedure. But before doing so, we refer to another aspect of this case that may be worthy of attention.

The defendant is a foreign corporation, and so is the plaintiff, both having their places of business in their domicile of origin, Virginia, as the complaint alleges. It does not appear in the case that defendant, being a foreign corporation, "usually did business" in Wake County, or that it had any property therein, or that the plaintiff resides in said county. The implication is that none of these facts existed, and if so, the Revisal, sec. 423, may require that the action should be tried in Tyrrell County, where the cause of action arose. As is said in the cases above cited, plaintiff must elect whether to sue in tort, for the trespass, or for the conversion, or, if the trees have been sold, in *assumpsit* for money had and received to its use, where the question of venue is

involved. The plaintiff should be permitted to amend its complaint, if in its judgment an amendment will avail anything in view of the provisions of Revisal, sec. 423, and the defendant should have the like privilege of amending the affidavit, upon which its motion for removal is based, if so advised to do, so that the facts, under Revisal, sec. 423, may appear more clearly and not merely by inference. We do not intend to say that causes of action in tort and in contract may not be joined, for they may be under the provisions of Revisal, sec. 469, but under that section and subsection they must belong to one of the classes enumerated in section 469, must affect all parties, must be separately stated, "and must not require different places of trial." Plaintiff cannot deprive defendant of the right to have a local cause of action tried in the proper county, or change the venue to the prejudice of the defendant and against his will, by uniting two causes of (614) action having different venues. This does not apply to actions for foreclosure of mortgages. Defendant would have the right to demur for misjoinder, but this right cannot be exercised until after he moves to change the venue, as the latter motion must come before pleading to the merits. Revisal, sec. 425. Where causes of action have been improperly joined and there is no waiver by failing to demur upon this ground, the court may order the action to be divided upon demurrer (Revisal, sec. 476), and we do not see why this should not be done, when they have been improperly joined, because triable in different places, if there is a motion in due time to remove to the proper county and before a demurrer is due in the regular course of pleading. But all that has been thus far said is subject, of course, to the provisions of Revisal, sec. 423, if ultimately found to be applicable. The court may still, in its discretion, entertain a motion to change the venue under Revisal, sec. 425.

There is no sufficient allegation of a breach of the covenant of warranty, as it does not appear that there has been an ouster or eviction under a superior title. *Britton v. Ruffin,* 123 N. C., 67; *Wiggins v. Pender,* 132 N. C., 636; *Griffin v. Thomas,* 128 N. C., 310.

The order is set aside and the case remanded for the purposes aforesaid.

Reversed.

Cited: Bryan v. Canady, 169 N. C., 583; *Ange v. Woodmen,* 171 N. C., 43.

(615)

J. E. BONEY ET AL. v. PAISLEY BONEY ET AL.

(Filed 28 March, 1913.)

1. **Evidence—Declarations—Transaction and Communications with Deceased Person—Interpretation of Statutes.**

Where the plaintiff and defendant claim title to lands under the same deed, the former seeking to engraft a parol trust thereon, testimony of the grantor as to transactions and communications with the deceased grantee tending to establish the trust is objectionable under Revisal, sec. 1631.

2. **Deeds and Conveyances — Parol Trust — Declarations—Knowledge of Grantee—Evidence.**

Where a parol trust is sought to be engrafted on a deed to lands purchased at a sale, testimony as to matters passing between other persons tending to establish an agreement that the purchaser should hold the land in trust is incompetent, unless knowledge and acquiescence thereof on his part can be proved.

3. **Evidence—Deeds and Conveyances—Letters—Res Inter Alios Acta.**

Where it is alleged that the defendant held the lands conveyed to him in trust for the plaintiff, letters passing between other parties, not written by or to him or with his authority, tending to establish the plaintiff's contention, are *res inter alios acta.*

4. **Evidence—Depositions Introduced in Part—Harmless Error.**

Semble, it is not error to exclude part of depositions offered in evidence, but held immaterial in this case where the whole cross-examination of the witness was offered, and the examination in chief which the appellant was required to introduce could not have affected the matter.

5. **Evidence—Depositions—Agreement of Counsel—Objections Taken at Trial—Practice.**

Where the counsel for both parties to the action have agreed that it may be done, the trial judge may pass upon, at the trial, objections to evidence contained in depositions which had been introduced.

6. **Evidence—Accusations Not Denied—Refusal to Make Statements—When Acquiescence Not Implied.**

The doctrine that silence in the presence of an accusation is some evidence of acquiescence therein should be received with great caution, and is not recognized where the accusation is made by a hostile party for the purpose of procuring evidence, when silence may be the only prudent course; and when it appears, as in this case, that the defendant was shown by a witness letters passing between others, and which he had not authorized, containing matters relating adversely to his interest, and involved in an action brought soon thereafter, and which he read, and, to the reiterated demands of the witness for a statement, said he would make no statement for fear he might say something he would later regret, his conduct affords no evidence that he assented to the truth of the statement made in the letters.

APPEAL from *Carter, J.*, at August Term, 1912, of DUPLIN. (616)

This is an action brought by the plaintiffs, as heirs of Mrs. E. M. Boney, to recover an interest in certain lands in and around the town of Wallace, in Duplin County, and to have set aside a deed made by Mrs. E. M. Boney to the defendant Paisley Boney, for said lands, the plaintiff alleging four causes of action: one being that the deed obtained by Paisley Boney from Mrs. E. M. Boney was obtained through fraud and undue influence; another alleging that the deed, though absolute on its face, was intended as a security for the debt due by Mrs. E. M. Boney to Paisley Boney; another that the deed was made to Paisley Boney in trust to hold for himself and the other parties plaintiffs and defendants; and the fourth that Mrs. E. M. Boney held the title in trust for herself and the plaintiffs and defendants, and that Paisley Boney took the deed with the knowledge of these facts, without paying value therefor.

Gabriel Boney, under whom all of the parties claim, was married twice, leaving children surviving him at the time of his death by each marriage, the plaintiffs and defendants being children of the second marriage and the issue of such children as had previously died.

During the lifetime of G. Boney he and two of his sons, namely, W. J. Boney and D. E. Boney, formed a copartnership and engaged in the mercantile business, which proved disastrous and resulted in the said firm executing a deed of assignment to G. J. Boney, another son of the said Gabriel Boney, the deed of assignment conveying among other things the land owned by W. J. Boney and the land owned by D. E. Boney and the land in controversy, which was owned by Gabriel Boney and known as his home place.

The assignee took charge of the assigned property, and in the course of the administration of his trust the real estate of W. J. Boney, D. E. Boney, and Gabriel Boney, which was conveyed by the deed of assignment, was by G. J. Boney put up and sold, and at the sale W. J. Boney's wife bought the real estate formerly owned by W. J. Boney, covered by the deed of trust; D. E. Boney's wife bought the real estate formerly owned by D. E. Boney and covered by the deed of trust, and Mrs. E. M. Boney bought the land in controversy which was formerly the property of Gabriel Boney, known as the home place, and deeds (617) were made accordingly by G. J. Boney, assignee.

There was evidence that the defendant Paisley Boney looked after his mother's business, and that he was trusted by her.

There was also evidence that he supported his mother until his death, 30 April, 1906, and that he also supported three single sisters until their marriage; Mr. Westbrook, a son-in-law of Mrs. Boney and a plaintiff, testifying on cross-examination as follows: "I first became acquainted

with the family of Mrs. E. M. Boney in 1896, and went there frequently for about twenty months up to the time of my marriage. They were furnished the necessities of life by their own efforts and by her son Paisley. I mean that they sewed and did things of that kind; I didn't mean that they took in sewing. My wife taught music. I don't know how much that amounted to. It would amount to something. During that time they had practically no income except what Paisley gave them. The farm yielded very little. There was Mrs. E. M. Boney and three girls living with her, from 18 and 19 to 24 and 25 years of age. They got along on mighty little. I don't know about the way they lived. I didn't know who paid for the clothes my wife was married in. I would have to say it was hearsay. From 1897, after I was married, up to the death of Mrs. E. M. Boney, they were supported by the same one who had supported them before. That was Paisley. I don't remember when Miss Lucy was married. I think it was a year or more after I was married. After she was married, the mother and Lula were left at the place. As far as I know, Paisley Boney continued to support them and bear all expenses. I never saw an account. If I answer, it will be from hearsay. I know that the burden of the family rested on Paisley's shoulders. Walter Boney was married at the time I became acquainted with the family, and did not contribute to the support of the family, to my knowledge. At the time I first knew the family, Ed. Boney was married and had a family. I am not positive about where he lived; I don't know whether he was in Georgia or North Carolina. I don't know anything about whether he contributed to the support of the family. I do not know of his having sent money to Ed. to
(618) keep him out of trouble. I don't know of my own knowledge that Ed. Boney, after his marriage, often had to wire to Paisley Boney for assistance. I do not know of Paisley incurring large expenses in cases of sickness and things of that kind. Since I have been married I have not contributed anything to my wife's mother or single sister's support. I do not know whether Ed. Cowell and his wife have or not. It was understood that Paisley was working hard as an express messenger. I don't know about his buying chickens and eggs to make a living for the family. To my knowledge, he never refused them a single thing he was able to give them. I think he was exceedingly good to the girls."

The deed of Mrs. E. M. Boney to Paisley Boney is of date 6 September, 1897, and there was no evidence of any claim by the plaintiffs prior to the death of Mrs. Boney.

The plaintiffs offered to prove by G. J. Boney, the grantor in the deed to Mrs. Boney, conversations and transactions between them, tending to establish the second, third, and fourth causes of action. This

evidence was excluded under section 1631 of the Revisal, and plaintiffs excepted.

Plaintiffs also offered to prove by D. E. Boney, at the time of the purchase by Mrs. E. M. Boney, it was understood that she was buying for herself and children. This witness did not state there was any such understanding with Mrs. Boney, but that it was so understood between himself and W. J. Boney and G. J. Boney. The plaintiff admitted that they could not show knowledge on the part of Mrs. Boney, except by evidence of conversations by G. J. Boney, and the evidence was excluded, and plaintiffs excepted.

The plaintiff, Mr. Westbrook, testified, among other things, that he went to see the defendant Paisley Boney in May after the death of Mrs. Boney, and carried two letters written by W. J. Boney to Walter Boney; that he handed the letters to the defendant, and he appeared to read them; that after he read the letters, witness asked him what he proposed to do about the matters dealt with in the letters; that he waited some time; that witness repeatedly asked for a decision, and defendant finally said he would make no statement for fear he (619) might say something he would regret later.

The first of these letters bears date 16 August, 1908, and in it the writer says: "Paisley advertised and sold some lots on Main and Railroad streets, which realized good prices; 35 x 90 feet sold for $170 to $225 per lot; eight lots sold for $1,488, one-fourth cash, balance in one, two, and three years time; and he anticipates selling more, thereby reimburse him for the money he has so long been spending supporting the mother and sisters, also to reimburse Ed, for his outlay; then there will be a residue to be divided after your mother's death. Unless Paisley should be able to buy up the shares, which I think he would like to do, he will probably write you about the matter later—as soon as he can see his way clear to do so."

The second letter bears date 15 December, 1898, and in it the writer says: "As I told you in the first letter, there are divisions to be made in father's home place by Paisley; he has bought out the whole tract and paid off the debt, and now there is a residue, and he proposes to either give the others a share or pay them for their shares."

The plaintiffs offered the letters in evidence, and his Honor excluded them, and plaintiffs excepted.

The deposition of Mrs. Harriet Turner was taken at the instance of the defendants, and was on file.

The plaintiffs offered in evidence the cross-examination, and upon objection his Honor held that this could not be done, and that plaintiffs must introduce the whole of the deposition or none, and plaintiffs excepted. His Honor then excluded two questions and answers in the

examination in chief, objected to by the plaintiffs, leaving as the only part of the examination in chief read to the jury the following:

Q. Your name is Harriet C. Turner? A. Yes.

Q. How old are you? A. Seventy-six.

Q. What relation were you to Mrs. Elizabeth M. Boney? A. I was her sister.

The entire deposition was then admitted, except his Honor (620) excluded two questions and answers bearing on the second, third, and fourth issues, and the plaintiffs excepted.

There are other exceptions to the charge and to the refusal to give certain instructions.

His Honor entered judgment of nonsuit as to the second, third, and fourth causes of action, and plaintiffs excepted.

The jury returned the following verdict:

1. Was the deed from E. M. Boney to the defendant Paisley Boney, dated 6 September, 1897, procured by fraud and undue influence of the defendant Paisley Boney, as alleged in the complaint? Answer: No.

Judgment was entered upon the verdict in favor of the defendants, and the plaintiffs excepted and appealed.

E. K. Bryan, H. D. Williams, and Robert Ruark for plaintiffs.

Stevens, Beasley & Weeks, Rountree & Carr, and A. D. Ward for defendants.

ALLEN, J. The evidence of G. J. Boney, offered by the plaintiffs and excluded by the court, was incompetent under section 1631 of the Revisal.

He was one through whom plaintiffs and defendants claimed, and was offering to testify, in behalf of the plaintiffs and against the defendants, as to conversations and transactions with Mrs. E. M. Boney, deceased, to whom the witness had executed the deed, and from whom the defendant derived his title. *Bunn v. Todd,* 107 N. C., 267.

The witness D. E. Boney was examined by the court in the absence of the jury. He said, among other things, while speaking of the sale by G. J. Boney, assignee: "Before the sale that morning I and the two brothers consulted about it, and it was agreed that our wives would bid off our place, and the widow was to bid off her place. This money was to go to pay off the creditors, provided it would do it. It seemed to be the understanding that she was buying for herself and children by the second marriage, but I don't know what was said about that. I don't know whether she was to buy it off as widow or buy it off and hold it for her husband's heirs. I don't know that that was (621) explained. I don't remember any explanation about that."

The court then excluded the evidence upon the statement by counsel for plaintiffs that they could not prove knowledge of the agreement or understanding upon the part of Mrs. E. M. Boney, except by the evidence of G. J. Boney, which we have held was properly excluded. This ruling was correct, but his Honor might have gone further, as the evidence of Mr. Boney shows that he had no recollection of any agreement or declaration of a trust.

The letters written by W. J. Boney to Walter Boney fall clearly within the rule *res inter alios acta,* as they were not written by the defendant Paisley Boney, or to him, or by his authority.

We have not been able to find a direct adjudication in this State sustaining his Honor in excluding parts of the deposition of Mrs. Turner because the whole was not offered, but the authorities elsewhere are in accordance with his ruling. *Killbourne v. Jennings,* 40 Iowa, 475; *Schwartz v. Brunswick,* 73 Mo., 257; *Hamilton v. Milliken,* 62 Neb., 117; *S. v. Rayburn,* 31 Mo. App., 386; *Lanohan v. Lawton,* 50 N. J. E., 276; *Grant v. Pembry,* 15 Kan., 242.

It is, however, immaterial, whether right or wrong, as the plaintiffs offered the whole of the cross-examination of the witness, and the examination in chief, which they were required to introduce, could not affect the case one way or the other, she testifying on the examination in chief to nothing except that her name was Harriet C. Turner; that she was 76 years of age, and was the sister Mrs. E. M. Boney.

The plaintiffs do not contend that the questions and answers in the deposition, excluded upon the objection of the defendants, were competent as they are presented, but that his Honor did not have the power to entertain the objections when the deposition was offered; but the answer to this contention is that his Honor acted upon an agreement of counsel that objections might be heard and passed upon by the judge at the trial.

Holding, as we do, that the evidence of G. J. Boney, D. E. Boney, and Mrs. Turner was properly excluded, there was remaining no evidence to support the second, third, and fourth causes of action, unless the conduct of the defendant Paisley Boney at the time (622) the letters were shown him by Mr. Westbrook is evidence of the facts alleged. Our Court recognizes the doctrine that silence in the presence of an accusation is some evidence of acquiescence in the charge, but we are admonished that it is so liable to misinterpretation and abuse that such evidence should be received with great caution, and should not be received at all, except under well recognized conditions. *Tobacco Co. v. McElwee,* 96 N. C., 74; *S. v. Jackson,* 150 N. C., 832.

As was said in *Moore v. Smith,* 14 S. & R., 393, which is cited with approval in the *Tobacco Co. case, supra:* "Two men at this rate might

talk a third out of his whole estate with a witness! Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be unless the evidence is of direct declarations of that kind which naturally calls for contradictions—some assertion made to the man, with respect to his right, which by his silence he acquiesces in."

In 2 Chamberlayne Mod. Ev., secs. 1401 and 1402, the author notes a distinction between oral and written accusation. He says (sec. 1401): "Should a party to a litigation deny the truth of a statement made to him, no reason exists for introducing the fact in evidence as an admission that the statement was true. On the contrary, should the person addressed fail to deny the truth of the statement made to him, or in his presence, it has been thought that under cover of the very illusory maxim that 'silence gives consent,' some rule of evidence of necessity renders admissible as against the party all which was said in his presence and not categorically or in substance denied by him. The dangers of establishing such a rule of procedure or canon of administration are obvious. No rights of a party whom any one saw fit to address concerning them would be safe under such a state of the law." Sec. 1402: "Experience shows that, in the case of the average man, a marked distinction exists between the readiness with which he will reply to an oral question and his readiness to answer, in writing, a written claim or demand. Those who are addressed directly, face to face, feel a
(623) spontaneous impulse frequently, perhaps the result of habit, to deny a false declaration regarding a matter which intimately concerns them. In proportion as yielding to such an impulse would be natural, failure to do so is significant. No such intuitive suggestion is, as a rule, presented where statements are made in writing. Even where the initial impulse is to reply, the feeling frequently fails to persist until it becomes effective in a resultant denial. Delay removes spontaneity. A stage of deliberation intervenes. No immediate necessity for taking a definite position may be felt. In view of these and similar considerations, it can scarcely be said that any uniform natural impulse to traverse erroneous written statements exists under ordinary circumstances."

The accusation must be direct and of a character which calls for contradiction. "Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party," and the circumstances must be such "as would properly and naturally call for some action or reply from men similarly situated." *S. v. Jackson, supra.*

One of the recognized conditions which justifies the exclusion of such evidence is that the accusation is made by a hostile party, and for the

purpose of procuring evidence, when silence may be the only wise and prudent course.

Judge Redfield says, in *Mattocks v. Lyman*, 16 Vt., 119: "But when the claim is made for the mere purpose of drawing out evidence, as in the present case it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation are such that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent to all which an antagonist may see fit to assert would involve an absurdity little less (624) gross than some of the most extravagant caricatures of this caricature-loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party—which would lead to the direct trial of the parties, instead of the case."

Applying these principles, we are of opinion that the conduct of the defendant, standing alone as it does, was not sufficient to have the second, third, and fourth causes of action submitted to a jury.

The witness who handed the letters to the defendant was a son-in-law of Mrs. Boney, and was endeavoring to procure evidence to be used on the trial of this action, which was instituted within six months thereafter. He made no charge himself which might have been expected to cause instant reply, but on the contrary handed the defendant letters and asked him to read them and say what he would do. The defendant had time for reflection, and knowing he was in the presence of a witness antagonistic to him, and that what he said might be misunderstood or misquoted, it was the part of prudence and wisdom to say nothing, for fear he might regret it. No direct charge was made in either letter, and if it may be inferred from the first that the writer intended to convey the idea that the residue would be divided because of an existing trust, the second goes far to destroy any such contention, as it is therein said that the defendant had "bought out the whole tract."

At most, the conduct of the defendant, under these circumstances, could have created no more than mere conjecture as to the existence of the causes of action, as to which judgments of nonsuit were entered.

We find no error in the trial of the issue submitted to the jury, and are of opinion the instructions to the jury were as favorable as the

plaintiffs had the right to expect. The rulings on the evidence of W. F. Murphy and Luther Carr are sustained by *Smith v. Smith,* 117 N. C., 326.

No error.

(625)

J. F. P. STEWART AND WIFE v. JOHN B. McCORMICK ET AL.

(Filed March 26, 1913.)

1. Deeds and Conveyances—Adverse Possession—Color—Evidence—Nonsuit.

In an action to recover lands, where the plaintiff relies on deeds describing the lands by metes and bounds as color of title and there is evidence in his behalf tending to show that he and those under whom he claims have been in open, continuous, and uninterrupted adverse possession, manifested by distinct acts of ownership under the deeds, for more than thirty years, it is sufficient to establish plaintiff's title, if the jury so find the facts to be; and a motion to nonsuit should be denied.

2. Deeds and Conveyances—Adverse Possession—Title—Constructive Possession—Interpretation of Statutes.

Where a party brings his action to recover lands and shows that he acquired title by adverse possession for more than thirty years, it follows, nothing else appearing, that he has had at least constructive seizin or possession of the lands within thirty years before he brought his suit, as required by Revisal, sec. 383.

3. Deeds and Conveyances—Color of Title—Adverse Possession—Constructive Possession—Outer Boundaries of Deed.

Where there is no question of lappage on the lands by conflicting calls in the deeds of contesting parties and claimed by one of the parties by adverse possession under color of title, who shows possession in a part of the lands as described in his deeds, the law constructively extends his possession to the external or outer boundaries of his deed.

4. Deeds and Conveyances—Color—Adverse Possession—Location of Boundaries—Nonsuit—Evidence, How Considered—Scintilla of Evidence.

Where the plaintiff claims the land in suit by adverse possession under color of title, by deeds with definite description of boundaries, upon a motion to nonsuit the evidence is viewed in the light most favorable to the plaintiff, and the motion should be denied if there is more than a scintilla of evidence as to the location of the boundaries to the land described.

5. Pleadings—Admissions—Possession at Commencement of Action—Evidence.

Where the defendant, in an action to recover lands, admits in his answer that he was in possession of the *locus in quo* at the time of the commencement of the action, it is not necessary for plaintiff to prove it by his evidence. As to whether this is necessary when the title in controversy is independent of the possession. *Quære.*

STEWART *v.* MCCORMICK.

APPEAL by plaintiff from *Bragaw, J.*, at October Term, 1912, (626) of CUMBERLAND.

Rose & Rose for plaintiffs.

Sinclair & Dye, Robinson & Lyon, and Shaw & McLean for defendants.

WALKER, J. This action was brought to recover a tract of land containing 250 acres. Plaintiffs were nonsuited at the close of their testimony. The first ground of the nonsuit was, as agreed here, that they had not identified the land, of which they had the adverse possession, as that described in the complaint and deeds, the description in the complaint and deeds being the same. Plaintiff relied upon the deeds as color of title, and they described the land by metes and bounds. There was evidence, as we think, that plaintiffs and those under whom they claimed had been in adverse possession, under the deeds, for more than thirty years, one witness, Nick Bell, testifying that "old man John Wood, under whom plaintiffs claimed, had been in possession for fifty or fifty-five years," and there was other testimony tending to show a possession of from forty to fifty years by him. In this connection, defendant's counsel contended that it was incumbent on plaintiffs to show a seizin or possession of the premises in question for twenty years before the commencement of the action, in order to maintain this action to recover the land under Revisal, sec. 383. But if plaintiffs had acquired the title by adverse possession of the land under color for more than thirty years, which was the evidence, then it follows, nothing else appearing, that they had at least constructive seizin or possession within twenty years before this suit was brought, which would satisfy the requirement of that section of the Revisal, as seizin follows the title, if there is no actual possession. *Bland v. Beasley,* 145 N. C., 168. The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, (627) the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. *Monk v. Wilmington,* 137 N. C., 322; *Bland v. Beasley, supra.* Sole adverse possession of a part of the land covered by the deeds under which plaintiffs claimed as color of title is extended by the law constructively to the outer or external boundaries of the land, or, as it is sometimes expressed, possession of a part is deemed to be of the whole. *Currie v. Gilchrist,* 147 N. C., 649; *Simmons v. Box Co.,* 153 N. C., 261; *Pheeny v. Hughes,* 158 N. C., 463. There is no conflict of titles here and no question of lappage. Where there is no actual occupation of the land, the law adjudges the possession to be in him who has the title (*Drake v. Howell.*

133 N. C., 163); but where, as here, there is a possession of a part of the land under color, and the party claiming thereunder has been exposed to an action for the trespass on or invasion of the premises, his possession must be taken as extending to the entire tract. *Pheeny v. Hughes, supra; McLean v. Smith*, 106 N. C., 172; *Berryman v. Kelly*, 35 N. C., 269. There certainly was some evidence that the possession of plaintiffs or of those under whom they claimed was adverse for a sufficient time to ripen the title, and this evidence should have been submitted to the jury (*Britton v. Ruffin*, 122 N. C., 113; *Cowles v. McNeill*, 125 N. C., 385), and the court erred in deciding the question as matter of law. As this is an appeal from a nonsuit, we need only say, as we did in *Currie v. Gilchrist, supra*, that there was more than a mere *scintilla* of evidence as to the location of the boundaries of the land described in the complaint and the deeds upon which plaintiffs relied as color (*McNeely v. Laxton*, 149 N. C., 327), and also as to adverse possession. The evidence may not have been very satisfactory, as argued by defendant's counsel, nor yet very convincing, but that was a matter for the consideration of the jury, and not for the judge below or this Court to pass upon. The evidence, also, must be considered most favorably to the plaintiffs, and all reasonable inferences made therefrom in their favor. All things considered, we must say that (628) there was some evidence that the State had parted with its title and that plaintiffs had become the owners of the land.

It was contended that plaintiffs had not shown that defendants were in possession of the land at the commencement of the action. Assuming that it is necessary to show this when the title itself is in controversy independently of the possession, it appears that one of the defendants, in his answer, admits he was in possession at that time, and the other defendants, in their answers, virtually admit their possession.

New trial.

Cited: Mintz v. Russ, post, 540; *Land Co. v. Floyd*, 171 N. C., 545.

J. B. WINDERS ET AL. v. J. G. KENAN ET ALS.

(Filed 19 March, 1913.)

1. Contracts, Unilateral—Deeds and Conveyances—Options—Acceptance.

Where in consideration of a certain sum of money the owner of lands agrees to convey them within a named period upon the payment of an agreed purchase price, the writing is unilaternal, an offer to give another the right to buy, an option, and not a contract to sell, which does

not bind the one accepting its conditions to purchase the land, and he is required to exercise his rights thereunder within the specified time, and perform the condition imposed as to payment, in accordance with the terms of the writing.

2. Same—Consideration—Rights of Parties.

Where a unilateral contract or option for the sale of lands is not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance; but if there is a valuable consideration to support it, the right continues during the period fixed in the option.

3. Same—Conditions Precedent—Tender.

Where an option for the sale of lands has been accepted, which provides for the payment of the purchase price as a condition precedent, it is the duty of the purchaser to pay in accordance with its terms, and a mere notice of his intention to buy is insufficient.

4. Same—Time of the Essence.

Unilateral contracts or options for the sale of lands are to be construed more strictly in favor of the maker, and the time of its performance by the one holding the option is of the essence of the contract, and the conditions imposed must be performed by him in order to convert the right to buy into a contract of sale.

5. Contracts, Unilateral—Consideration—Purchase Price—Interpretation of Contracts—Conditions Precedent.

A written contract for the conveyance of land which expresses the consideration of $500 paid to the maker, and that upon the payment of a certain sum he will make the deed thereto, is construed to mean that the $500 was paid for the right to buy, and that this right cannot be exercised until payment or tender of the purchase money is made.

6. Same—Waiver—Acceptance—Tender.

Where as a condition precedent to the delivery of the deed an option on land provides for the payment of the purchase money by a certain time, and this payment is delayed by reason of the maker not being prepared with his deed, and thereafter the proposed purchaser is notified of the maker's readiness, the previous waiver of the time of payment by the maker does not excuse the purchaser from making a prompt tender of the purchase money, in accordance with the terms of the option; and his mere notice that he will exercise the right is ineffectual to secure it.

7. Contracts, Unilateral—Conditions Precedent—Tender—Failure of Performance—Deeds and Conveyances—Alterations.

Where the payment of the purchase price is made a condition precedent to the right to exercise an option for the purchase of lands, and the proposed purchaser has failed to tender the purchase price in accordance with his contract, any alterations in the deed by the maker thereafter becomes immaterial, the purchaser having lost the right to demand the deed his option had called for.

APPEAL from *Carter, J.*, at August Term, 1912, of DUPLIN.

This is an action to compel specific performance, based upon the following instrument:

This agreement, executed this 17 January, 1905, by and between James G. Kenan and heirs of O. R. Kenan, of the county of Duplin and State of North Carolina, of the first part, and J. B. Winders
(630) and L. F. Hall of the second part: Witnesseth, That said party of the first part, for and in consideration of the sum of $500 to him in hand paid by the said party of the second part, the receipt whereof is hereby fully acknowledged, doth agree that upon the payment of $10,000, $2,000 of which is to be paid 1 April, 1905, and the remainder in four annual payments, with interest at 6 per cent, to give, grant sell and convey by proper deed with full warranty and assure to the said party of the second part, his heirs and assigns, all the trees on the following described tract of land, situated in the said county and State, adjoining the land of David Brooks, James Carr, and others, bounded as follows, to wit: North David and James D. Brown, east by Billie Brock and S. W. Cavenaugh, south Northeast River, west James Cavenaugh and Murphy's heirs.

Exceptions—For Plantation Purposes:

Cypress in Murphey's slew and privileges to clear any of said land, also the right of way for the party of the second part, his agents and servants, his heirs and assigns, and their agents and servants to go upon the said lands, and all other land of the party of the first part, for the term of ten years, with an extension of ten years by paying interest and amount of purchase annually during time of extension, to remove the said timber, and the permanent and exclusive right to build railroads and tramroads and to erect all necessary buildings and machinery thereon and to remove the same. In witness whereof the said party of the first part hath hereunto set their hands and seal the day and year first written above.

JAMES G. KENAN	[SEAL].
THOMAS S. KENAN	[SEAL].
MARY H. KENAN	[SEAL].
MRS. JAMES G. KENAN	[SEAL].
SALLIE D. KENAN	[SEAL].
ANNIE D. KENAN	[SEAL].

The probate of this instrument was not complete until 25 April, 1905, and it was registered on 1 May, 1905.

About 1 April, 1905, one of the plaintiffs and James G. Kenan, who represented the other makers of the instrument, met in Kenansville for the purpose of having a deed prepared, and a deed was prepared
(631) in accordance with said writing, and at that time the said plain-

tiff told the said Kenan that he would be ready to make the first payment when the deed was delivered.

The probate of the deed was complete about 10 April, 1905, and the plaintiffs were notified thereof during the month of April, and not later than 27 April.

The plaintiff offered evidence tending to prove that between 6 March and 10 March, 1905, they told the said Kenan that they would take the timber, and for him to prepare a deed, and that the money was ready, and that the said Kenan said that he would have to have a little time, as the parties did not live close together, and that a few days would not make any difference as to the execution of the deed or as to the payment of the money; that on 30 May, 1905, the plaintiff tendered to the defendant the sum of $1,500, which the defendants refused to accept, and declared the contract at an end; that in the fall of 1905 or the spring of 1906, the plaintiffs tendered to the defendants two checks, one in the sum of $2,500 and the other in the sum of $9,220, which were refused; that on 28 February, 1908, the plaintiffs tendered to the defendants $2,240, which was refused; then in March, 1909, the plaintiff tendered to the defendants the sum of $2,120, which was refused; that during the last of March or the first of April, 1909, the plaintiffs tendered to the defendants $9,500, and four years interest thereon, which was refused.

There was no other evidence upon the part of the plaintiff of the tender of any part of the purchase money, but they did offer evidence that they were at all times ready, able, and willing to pay the purchase price, but they contended that the $500 first recited in said instrument was a part of the purchase price, and that the balance was $9,500, instead of $10,000.

They also offered evidence tending to prove that after the deed was written on 1 April, 1905, material changes were made therein, so that it did not conform to said instrument, and that they declined to accept it, on that ground. At the conclusion of the whole evi- (632) dence, his Honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

G. E. Butler, Kerr & Gavin, and Faison & Wright for plaintiffs.

Stevens, Beasley & Weeks, H. D. Williams, and W. P. Stacy for defendants.

ALLEN, J. In bilateral contracts there are reciprocal promises, so that there is something to be done or forborne on both sides, while in a unilateral contract there is a promise on one side only, the consideration on the other side being executed. 9 Cyc., 244. An option belongs to

the latter class. It is a contract to give another the right to buy, and not a contract to sell; and it is because of the fact that the other party is not compelled to buy, that it is spoken of as an offer.

In *Black v. Maddox,* 104 Ga., 157, approved in *Trogden v. Williams,* 144 N. C., 199, it is defined to be "the obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time."

If not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance (*Paddock v. Davenport,* 107 N. C., 710); but if there is a valuable consideration to support it, the right continues during the period fixed in the option. *Cummins v. Beaver,* 103 Va., 230. In this case the Court said: "The distinction between an option given without a consideration and an option given for a valuable consideration is, that in the first case it is simply an offer to sell, and can be withdrawn at any time before acceptance, upon notice to the vendee; but, in the second, where a consideration is paid for the option, it cannot be withdrawn by the vendor before the expiration of the time specified in the option."

If no conditions are imposed upon the prospective purchaser, and it is a simple proposition giving the right to buy, upon notice of
(633) acceptance it becomes a contract of sale and is obligatory on both parties, and it is then the duty of the seller to tender his deed and of the purchaser to pay according to its terms. *Hardy v. Ward,* 150 N. C., 393.

The maker has, however, the right to impose conditions which must be performed precedent to the exercise of the right to buy, and among these is the payment of the agreed price. *Weaver v. Burr,* 31 W. Va., 201; *Pollock v. Brookover,* 6 L. R. A. (N. S.), 407; *Trogden v. Williams,* 144 N. C., 201.

In the *Trogden case* the language in the contract was: "If they shall, within the time hereinafter specified, elect to purchase said land, then and in that event they shall pay one-half cash and the balance in twelve months, to be secured by mortgage"; and the Court held that "payment of one-half the purchase money and securing the other half constitute the method of electing to purchase," and quoted with approval the following excerpt from *Weaver v. Burr, supra:* "The period of sixty days from 7 June, 1883, mentioned in the option, within which plaintiff had the privilege of buying the land . . . expired on 6 August, 1883. During the whole of that period and during the whole of 6 August plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of

and compliance with the terms thereof. They could not do so in any other manner than by actual payment or tender of the whole price of the land before the sixty days expired. Neither could they withhold the payment, or tender of payment, until a proper deed was executed or survey could be made and the excess number of acres ascertained." Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy, and it is generally held that time is of the essence of such a contract, and that the conditions imposed must be performed in order to convert the right to buy into a contract of sale.

The acceptance must be according to the terms of the contract, and if these require the payment of the purchase money or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy or that (634) the party will take the property does not change the relations of the parties. *Bateman v. Lumber Co.,* 154 N. C., 251; *Clark v. Lumber Co.,* 158 N. C., 139; *Kelsey v. Crowther,* 162 U. S., 404; Pom. Spec. Per., sec. 387; *Weaver v. Burr, supra; Trogden v. Williams, supra; Pollock v. Brookover,* 6 L. R. A. (N. S.), 407; *Killough v. Lee,* 2 Tex. Civ. App., 260; *Stembridge v. Stembridge,* 87 Ky., 94; *Shields v. Horback,* 30 Neb., 540; *Holleman v. Conlon,* 143 Mo., 379.

In the *Bateman case, Justice Hoke,* in discussing a provision in a contract in regard to land, says: "The provision in question, conferring, as it does, a privilege, and unilateral in its obligation, partakes to some extent of the nature of an option, in which time is ordinarily of the essence, and the accepted doctrine in reference to this and other instruments containing the same and similar language is that they should be strictly construed. There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound," and quotes with approval from *Estes v. Furlong,* 59 Ill., 298, that "when a contract is in any wise unilateral, the court will regard any delay on the part of the purchaser with especial strictness."

In the *Kelsey case* the Court said: "The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought

by Crowther. But if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. To entitle themselves to a decree for specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule (635) is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced specific performance. In such a case, if the vendee wishes to compel the other to fulfill the contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part or a tender and refusal."

In the case from Texas the appellant paid $50 for an option to buy within six days thereafter a lot in Galveston for $12,000 cash, upon payment of which appellee was to make deed. Within the six days he notified the agent of appellee that he would take it, and offered to deposit such amount as might be required of him to bind the purchase pending examination of title, which was declined, and payment of the whole $12,000 required, and it was held that payment of the purchase price was necessary to constitute a valid acceptance.

And in the case from Missouri the Court declares the same principle, saying: "The distinction is justly taken by the authorities between a perfected contract, that is, where both parties are bound, and therefore, ordinarily speaking, time is not regarded as of the essence of the contract, and an option contract, where only the intended vendor is bound and the intended vendee not bound, where the relation of vendor and purchaser does not exist and does not become existent until acceptance by the proposed vendee by the performance of the specified condition and within the time specified. In such cases a court of equity will hold that in consequence of the one party being bound and yet unable to enforce the unilateral contract against the other, who is free, that the parties do not stand on an equal footing, and that, in consideration of these things, time must be deemed of the essence of the contract, and that when the time given by the memorandum expires without performance on the part of the option holder, the right of such holder is *ipso facto* gone."

It is needless to quote further from the authorities cited. They fully sustained the principle announced, except, perhaps, the *Clark* (636) *case,* which is only pertinent upon the proposition that an acceptance must be upon the terms imposed by the offer.

Applying these principles to the facts, we are of opinion that the plaintiffs are not entitled to specific performance.

The paper-writing does not purport to be a contract to convey, is unilateral, and is what is designated as an option.

In *Alston v. Connell,* 140 N. C., 488, the paper construed by the Court was as follows: "This is to certify that I, Thomas Connell, did, on this the 5th day of December, 1898, purchase the 600-acre tract, known as the 'Tusculum farm,' and doth thereby bind himself, heirs and assigns, at any time previous to 1 December, 1898, to sell the same to whom P. G. Alston may direct for $3,502. Witness, etc. Thomas Connell (Seal). Two hundred and fifty dollars of which is for improvements for 1899, which if not used, or any part thereof, is to be returned to the said P. G. Alston. (Signed) Thomas Connell."

This paper had many more of the characteristics of a contract to sell than the one relied on by the plaintiff, because the maker binds himself to sell before a certain time; but the Court said: "We agree with the defendants, that this was a unilateral contract, commonly called 'an option'—a proposition to sell, binding and irrevocable by the owner till the stipulated time expires, but in which time was of the essence under ordinary circumstances, and, in cases like the present, requiring payment of the price as a condition precedent."

In the writing before us the makers, in consideration of $500 paid, agree upon the payment of $10,000, of which $2,000 was to be paid 1 April, 1905, and the remainder in four annual installments at 6 per cent interest, to give, grant, sell, and convey by proper deed, etc., which if we adopt a liberal and not a strict construction can mean no more than that the $500 was paid for the right to buy, and that this right could not be exercised, nor were the makers under any obligation to convey, until payment or tender of the purchase money.

If this is the correct interpretation of the writing, the notice given by the plaintiffs in March, 1905, that they would take the timber, did not change the relations of the parties and convert the writing into a contract to sell, because the writing imposed the further condition (637) of payment of the purchase money.

Nor can the conversation at the time the deed was written have this effect, as no money was presented or tendered, and it amounted to no more than an expression of readiness to make the first payment of $2,000 upon delivery of the deed.

It may be conceded, as contended by the plaintiffs, for the purposes of this appeal, and not otherwise, that the conversation with one of the defendants in March, the delay in the execution of the writing sued on and in the execution of the deed, work a waiver of the right to demand payment on 1 April, 1905; but it appears from the record that the paper-writing was complete on 25 April, 1905, and was registered on

1 May, thereafter, and the plaintiffs were notified on 27 April, 1905, that the deed was ready for delivery.

After notice of the execution of the writing and of the deed, there was no excuse for further delay, and it was then incumbent on the plaintiffs to pay or tender the sum of $2,000 at least, promptly.

They did not do this, but, on the contrary, waited until 30 May, 1905, before they offered to pay any amount, and then only the sum of $1,500, which was not in compliance with the writing upon which they sue, in time or amount.

The defendants refused to accept, and declared the contract at an end, as they had the right to do, and it could not be revived without their consent by subsequent offers to pay.

In the view of the case we have adopted, the alteration of the deed after it was written is not material, as the correspondence shows that while the defendants wished some modification of the option, they did not refuse to execute a deed in accordance with its terms until the plaintiffs had by delay lost their right to demand it.

If under the writing the plaintiffs had been required to do no more than give notice of acceptance, they would have had the right to delay payment until a deed was tendered conforming to the writing, but they were required to pay before they were entitled to demand a deed of any kind, and had not placed themselves in position to criticise the one offered.

We have discussed the case in the light most favorable to the
(638) plaintiffs, upon the assumption that they could have demanded a deed upon the payment of $2,000, but we do not so decide, as the writing says upon the payment of $10,000, of which $2,000 was to be paid on 1 April, 1905, and the remainder in four annual installments, the makers agree to sell and convey.

For the reasons given, we are of opinion there was no error in entering the judgment of nonsuit.

Affirmed.

Cited: Binford v. Steele, post, 664; *Gaylord v. McCoy, post,* 693; *Ward v. Albertson,* 165 N. C., 22; *Timber Co. v. Wells,* 171 N. C., 264; *Cozad v. Johnson, ib.,* 642.

D. L. GORE v. DUNCAN McPHERSON.

(Filed 2 April, 1913.)

1. Deeds and Conveyances—Unregistered Deeds—Color of Title—Adverse Possession—Limitations of Actions.

Where the parties to an action involving the title to lands do not claim from a common grantor, an unregistered deed is color of title, and evidence is admissible to show that the party claiming under the deed has held adverse possession sufficient to ripen his title.

2. Same—Registration—Vested Rights—Instructions.

The plaintiff claimed title to the lands in dispute under a grant from the State and mesne conveyances, excluding 200 acres as being owned by the defendant. The defendant introduced in his chain of title a deed made in 1818, registered in 1912, purporting to convey five tracts of the land by separate descriptions, aggregating 335 acres: *Held*, it was competent for the defendant to show such possession as ripened his title under the description of the lands in the deed of 1818, as color, and it was error for the court to instruct the jury that if the land claimed by the defendant was embraced in those described in the plaintiff's prior grant, he could not recover.

3. Same—Evidence.

In this case, title to the lands in controversy was admittedly out of the State, and the defendant claimed under a deed made in 1818 as color of title, which was registered in 1912, under authority of the statute: *Held*, upon the question of holding adverse possession under this deed, it was competent for him to describe the lines of the deed with reference to the lands, saying there were chops and blazes on them; that he had lived thereon for 65 years, and had planted it in corn and cotton, etc., and he and his father had been in possession to the lines he had described, etc.: and *Held further*, the evidence was competent also to show title without "color."

APPEAL by defendant from *Peebles, J.*, at October Term, 1912, (639) of SCOTLAND.

This is an action to recover land.

The plaintiff offered in evidence a grant to Andrew McMillan for 6,000 acres of land, of date 31 January, 1853, and mesne conveyances from the said McMillan to himself.

In the deed to the plaintiff there is an exception of 200 acres, as being owned by the defendant, Duncan McPherson, which is described by metes and bounds.

The plaintiff also offered evidence locating his paper title and identifying the land therein described as the land described in the complaint.

The defendant claimed that he was the owner of 335 acres of land within the boundaries of the grant, and not 200 acres, as contended by the plaintiff, and admitted that he was in possession of the same.

A survey was made under order of court, and the contention of the defendant as to the location of the 335 acres is represented on the plat by the figures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

The greater part of the 200 acres, as shown on the plat, is within the claim of the defendant, but a part is not. The home and outbuildings of the defendant are on the 200 acres as located on the plat.

The defendant introduced a deed from Mary Gordon and others to his grandfather, John McPherson, of date 9 February, 1818, and registered in 1912, purporting to convey five tracts of land by separate descriptions, which aggregated 335 acres.

The testimony of the defendant in his own behalf and the exceptions to the rulings during his examination are as follows:

(640) "I have heard this deed read, and am familiar with the lands described in deed Gordon to McPherson. I reckon I am. I don't reckon anything about it; I know it. I am not familiar with all the lines in these tracts; no, sir, not all of these tracts. It is all run in together, the way I understand it. This land is located at lines all around my place there. I could not tell you exactly where. It lies around my house, on the place there. I claim 335 acres. I don't understand this map. I have seen the lines run, starting at 1 to 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and back to 1."

Q. Are those the lines, outside lines, called for in this deed? (Plaintiff objects; objection sustained, and defendant excepts.)

Q. What lines are those? (Plaintiff objects.)

Counsel for defendant here states that he proposes to show by the witness that these lines (1 to 13 and back to 1) indicate the outside lines called for in the deed to John McPherson. (Plaintiff objects; objection sustained, and defendant excepts.)

Q. What are the lines in your deed? Point them out on that map. (Plaintiff objects; objection sustained, and defendant excepts.)

"I pointed out the lines I claim to Mr. McLean. I think this was about sixteen years ago. He gave me this map."

Q. What are the boundaries in this deed—that you claim under this deed? (Plaintiff objects; objection sustained, and defendant excepts.)

"I can go around the boundary of my land. My boundaries begin 100 yards of the old cotton house and run thence to the corner, up to Briar Branch; thence corners, and runs another straight line across to the mouth of Tars Fork. These boundaries are marked with blazes and chops. The beginning corner is on a little knoll about 50 yards of Briar Branch. Corner was there at one time, but when McLean surveyed, no corner was there then, and he hit another corner and then found the corner. It run out about a quarter of a mile of my house, on the south

side, and crossed Tars Fork and down the branch a quarter of a mile, and crossed it again, and come back inside the edge of my old field. It went nearly a quarter of a mile altogether, and came to a corner. A lightwood knot stuck down in the ground indicates my corner. I don't know how long it has been in the ground, but it has been a (641) good while—twenty-five or thirty years—I don't know exactly how long. I was at home the last day McLean surveyed the land. He surveyed it two or three times. I was with him when he surveyed it the last time. I did not point out to him the lines to survey. He surveyed by nothing that I could see. He did not survey the lines I had previously pointed out to him as my contentions."

Q. Point out to the jury what lands you have been claiming or been in possession of. (Plaintiff objects; objection sustained, and defendant excepts.)

Q. Of the lands that you have just described a little bit ago, where your lines run, what use have you been making of those lands? (Objection by plaintiff; objection sustained; defendant excepts.)

"My house is within the boundary of that deed. I live on the 100-acre tract, in the southwest corner of the square 200 acres. Besides this lightwood knot that I spoke of, there are some blazes on a tree. I don't know exactly how many blazes, but blazes and chops. I don't think there is any marked tree around the beginning corner. I don't think any tree is close to the beginning corner. I don't know that I can describe the lines around those tracts that I have seen—tell how any one can distinguish them and find them. It starts at foot of Briar Branch and runs—I don't know exactly how far—to a corner, and turns and goes in that direction. There are pines, blackjack pointers, and lightwood stobs, blazed and chopped, three chops on them. The next line is blazed and chopped; has a lightwood knot corner, a little pine and a little blackjack pointer; they are chopped three chops. The next line is a little more than one-half mile long. It is marked in chops, and about halfway on that line is an old corner, and there is another lightwood knot there and some chopped trees. I don't think but two chopped trees, one on each side on a straight line. The next line, chops and blazes. Then you strike Martin McPherson's land. Last line is not marked at all; it lapses. There it strikes another corner and a dead pine, and lightwood knot is struck up there. Nothing else, only blackjack pointers. Next line comes on back towards the beginning corner; one lightwood knot struck up there, about halfway to the beginning corner. I don't know how long I've been in possession of that (642) land—I reckon you call in possession—ever since I was big enough. Me and my father lived there. I have lived there sixty-five

years. I have planted it in corn, cotton, worked it in turpentine, and cut cross-ties on it. I farmed on it ever since I was big enough to farm. I worked turpentine about four years. That has been thirty-five years ago, I reckon. I have been farming on it, working turpentine and cutting crossties, all I could, on it. I have been doing all that. That has been going on between forty and fifty years. No one else has been in possession besides me. I don't know exactly how long it was the first timeI saw the land in this deed survey. Thomas Gibson surveyed it. I was a boy at the time, and don't recollect exactly what surveying he was doing. He surveyed mine and my father's lands around there; surveyed the entire tract of 335 acres."

Q. How did he mark it as he surveyed this land? (Objection by plaintiff.)

Defendant's counsel here states that he proposes to show by the witness that Thomas Gibson, the surveyor, had the lines marked by chopping the trees along same and blazing the line trees, and establishing corners at the time of his survey, covering the lands now in dispute. (Plaintiff objects; objection sustained, and defendant excepts).

"I have built two houses on the land—first one about fifteen years ago; then there is the old one that has been there twenty or twenty-five years. My father built six houses on the land; they were not all rental houses; they were cribs. I declare I don't know how much I have cleared. I suppose about 200 acres of it altogether, by grandpa, father, and myself. I don't know what grandpa did, only what they told me. The reason I didn't carry my deed to McLean the last time he surveyed was because he didn't ask me for it; he had it before, and I thought that was enough. I have exercised possession half-mile one course, 300 yards another course. I stopped where my lines were. I worked on it to where it was marked to the west side; then there was a branch or creek.

I have been in possession ever since my father died, and my
(643) father before then, up to these line I have described. My father died 17 September, 1880. His name was Duncan McPherson, same as mine. I do not know who put the marks on my lines. The blazed trees were different sizes, some good-sized pines and some little ones. I couldn't tell exactly how old they are. I was with McLean a part of the time when he surveyed the square 200 acres. He ran through my land two or three times before he got it straight. I do not know exactly where those boundaries are. I was with him when he run some of the lines. I don't know how many lines. I was on one of the lines, I'm sure. He started in surveying the 200 acres at the southwest corner, and run due north, then due east, then south, then back to the beginning. I was with him a part of the time of the first line, but

don't think I was with him at all on the second line. Was on the south line part of the time, and a part on the closing-up line. I know where those lines are. This square 200 acres does not include all the cleared land, and some inside of it is not cleared. The cleared part outside of the 200 acres is on the west side. I expect it was turned out fifty years ago. I had it boxed. I don't suppose it has been cultivated in fifty years. There is some cleared, but not cultivated, outside of the 200 acres. I do not know where the pine near two pine pointers, etc., in the Gordon deed is. I know where the line 'running north 50 poles to a stake' is. I have been trying to point it out the best I could on the map. I can't point it out on the map. If I was home I could point it out and show you all the corners. There are several corners called for. 'Beginning at a pine near two pine pointers on the south side of a small hollow.' I don't know where the two pine pointers are, but I know where the pine is. I know about the hollow. I reckon I could come mighty nigh pointing it out on the map. The hollow is outside of this survey—not on the map. No, I guess it's inside of this plat. The 25 acres don't belong to this land at all. I don't think any other of this land is outside of the land I claim. 'Beginning at a pine pointer on the south side of Big Muddy Creek'—that is all inside of this survey. I couldn't tell you whereabouts. 'Running south 45 west 32 chains' is one of the lines around my land. I don't know where several of these lines are. It all runs around (466) together, and I know where these lines run around. I don't know where the various lines in these various tracts are, but I know where I thought it was, and if I was at home I could walk around it. I know, because it is marked around there. The map is not marked off so I can tell the different tracts."

His Honor, among other things, charged the jury as follows:

"There is but one view for you to decide. The question is, Is the land in question, outside of the 200-acre piece marked on the map in the square, embraced and included in the boundary in the grant and deeds coming down from that grant to the present time? The defendant claims this land under a deed to his grandfather, John McPherson, dated 1818, recorded here some time ago, under act of the Legislature, authorizing a deed of that sort to be recorded. But that act especially says that the effect of that deed shall not interfere with any vested rights. At the time that deed was recorded, if this land was embraced in the grant and deeds introduced by plaintiff, then title to that land vested in the plaintiff, and that act would not divest it," and defendant excepted.

Russell & Weatherspoon and U. L. Spence for plaintiff.

Coxe & Dunn for defendant.

ALLEN, J. When his Honor told the jury that the only question for them to decide was whether the grant and deeds under which the plaintiff claimed covered the land in controversy, he, in effect, withdrew the consideration of the deed under which the defendant claimed as color of title, and the evidence of adverse possession, which he had offered, and in this there was error.

It is true, it was said in *Austen v. Staten,* 126 N. C., 783, which was affirmed in *Lindsey v. Beaman,* 128 N. C., 189, that an unregistered deed is not, since the Connor Act of 1885, color of title, but in the subsequent cases of *Collins v. Davis,* 132 N. C., 111, and *Janney v. Robbins,* 141 N. C., 406, this language was restricted to grantees from a com-

(645) mon grantor.

In the *Janney case, Justice Hoke,* speaking for the Court, said: "In *Austen v. Staten* the plaintiff claimed under a deed to himself from H. W. Staten, and two others, dated 31 March, 1896, registered the same day. The defendant claimed under a deed to himself from the same parties, dated 31 December, 1887, registered 31 May, 1897. It will be noted that there both parties claimed from the same grantor, and the plaintiff's deed, though dated nine years or more later than the defendant's, had been registered more than a year prior to the defendant's deed. There were questions of fraud involved in the case, in no way material to the point now considered. By the express provisions of the registration act, the plaintiff on the record and face of the papers had the superior right, because his deed had been first registered. Defendant then took the position that though his deed, by virtue of the registration act, was avoided as against plaintiff, yet the same was good as color of title, and proposed to maintain his title by showing occupation under his unregistered deed for seven years. The Court held that to allow this would be 'in effect to destroy chapter 147, Laws 1885, and this we cannot do.' Whatever might be the position of the Court if this were an open question, we think it clear that the principle there announced must be confined to the facts of the case to which it was then applied, and does not extend to a claim by adverse possession held continually for the requisite time under deeds foreign to the true title or entirely independent of the title under which plaintiff makes his claim. As to such deeds and claimants, our present registration law does not, and does not intend to, modify or interfere with the doctrine of maturing title by adverse occupation as heretofore expounded and applied by the decisions of this Court."

The deed being color of title, the evidence of the defendant as to the boundaries of the several tracts described, and of his possession, was competent.

If, however, the defendant claimed under no deed, it was admitted that title was out of the State, and he offered evidence of an adverse possession for more than twenty years. His testimony was not always as specific as might be desired, but when it is remembered (646) that he can do little more than write his name, and that he was stopped every time he attempted to describe his boundaries, it was as definite as could be expected under the circumstances.

It was in evidence that he claimed up to the lines of the 335 acres, and he attempted to describe the lines, saying there were chops and blazes on them; that he had lived on the land sixty-five years and had planted it in corn and cotton, and had worked the turpentine and had cut cross ties; that he and his father had been in possession to the lines he had described, and he offered to prove that when he was a small boy he saw a surveyor run the lines and mark them by chopping and blazing trees and establishing corners covering the 335 acres, which was clearly competent.

As the evidence now stands, the plaintiff has established a *prima facie* title, and the defendant is not entitled to the benefit of a common survey provided for in chapter 35 of Battle's Revisal, but he has the right to have his evidence of title by adverse possession, whether with or without color, considered by a jury.

New trial.

Cited: King v. MacRackan, 168 N. C., 624; *Buchanan v. Hedden,* 169 N. C., 224.

DANIEL J. NANCE ET EL. v. W. A. ROURK ET EL.

(Filed 26 March, 1913.)

1. Contracts—Possession in Subordination to Another's Title—Estoppel.

Where one acquires possession of land by contract or agreement with another, and in subordination to his title, he is estopped to deny that title until he has surrendered the possession so acquired and placed the one with whom he has thus dealt at arm's length with himself.

2. Same—Evidence.

In an action to recover a tract of land it is competent for the plaintiff to show, as to whether the defendant entered the possession of the lands under an agreement with him and in subordination to his title; that when he moved his residence therefrom and to another county the defendant or his agent promised to take charge of the land and look after it in his absence, and to pay taxes, which he was to repay on being notified; that defendant agreed to list the taxes in the plaintiff's

name; that defendant was to receive the rents to be applied on an account due him by plaintiff; that some three years ago defendant asked plaintiff to sell him the land.

3. Nonsuit—Evidence, How Construed.

In this action to recover a tract of land there was evidence tending to show, and *per contra*, that the defendant entered upon the lands under an agreement to hold the same for the plaintiff, and in subordination to his title; that the defendant had never surrendered or offered to surrender the possession to the plaintiff, and plaintiff had made no demand therefor until he brought his suit: *Held*, under the principle that on a motion to nonsuit upon the evidence the evidence must be viewed in the light most favorable for the plaintiff, the motion was erroneously granted.

APPEAL by plaintiffs from *Bragaw, J.*, at September Term, (647) of BRUNSWICK.

This action was brought to recover a tract of land containing 200 acres. Plaintiffs claimed the land under a deed from Evander Canady. At the close of the plaintiffs' testimony, the court, on motion of defendants, nonsuited the plaintiffs, and they appealed.

C. Ed. Taylor for plaintiffs.
Cramer & Davis and Robert Ruark for defendants.

WALKER, J., after stating the case: The question in this case is the sufficiency of the plaintiffs' evidence to show title and the right to the possession of the land. There was some evidence of the adverse possession of the land before Evander Canady bought it from John J. Hawes on 1 March, 1885, but we need not, at present, inquire whether it was sufficiently continued and notorious to show title out of the State or to vest the title in Canady or those under whom he claimed, as we are of opinion that there was other evidence which should have been submitted to the jury upon the plaintiffs' title and right to the possession of the land. It is a settled rule of the law that where one acquires (648) possession of land by contract or agreement with another and in subordination to his title, he cannot ordinarily dispute that title until he has surrendered the possession so acquired and placed the one with whom he has thus dealt at arm's length with himself. *Farmer v. Pickens*, 83 N. C., 594; *Pate v. Turner*, 94 N. C., 47; *Yarborough v. Harris*, 14 N. C., 40; *Burwell v. Roberts*, 15 N. C., 81; *Campbell v. Everhart*, 139 N. C., 503, and cases cited; 16 Cyc., 804. "The rule," said *Chief Justice Ruffin* in *Yarborough v. Harris, supra*, "is founded on high grounds of morality and good faith, and at all times ought to be rigidly adhered to, where circumstances require its application"; and *Justice Dillard* said in *Farmer v. Pickens, supra*, that "the rule is

founded on a principle of honesty, which does not allow possession to be retained in violation of that faith (and confidence) on which it was obtained or continued." Herman in his work on Estoppel (1886), at p. 981, sec. 854, states it as a general principle that "where a party has kept or obtained the possession of land which he otherwise would not have had, by means of an agreement or understanding, he shall be estopped from setting forth anything in opposition to its terms or intent, in a suit brought in order to recover such possession," citing many cases. This being so, it appears in this case that Evander Canady claimed the land and had a deed therefor, and that when he changed his residence from Brunswick to Columbus County some years before the trial, he had an agreement with the defendants, or with W. A. Rourk, acting for them, by which they promised to take charge of the land and look after it for him while he was absent, and to pay the taxes thereon, which Canady promised to pay to them when notified of the amount. Plaintiffs proposed to show by Evander Canady that defendants agreed to list the land for taxes in his name, but this evidence was excluded. It was also proved that it was further agreed between Canady and defendants that the rents of the land should go to them until a store account due by Canady to them was paid. Plaintiffs further proposed to prove by Canady that he had a conversation with defendant W. A. Rourk, three years ago, in which the latter asked Canady to sell the land to him, but this evidence was ruled out. Canady has been absent for many years, though he lived within about 50 miles of the land. (649) Defendants have never surrendered the possession, nor has any demand been made upon them for same until this suit was brought, so far as appears.

We do not see why the excluded evidence was not competent in connection with that which was admitted, or why the testimony of the witness Evander Canady should not have been submitted to the jury, under the principle we have stated. There was at least some evidence that defendants obtained the possession of the land under the agreement with Canady, and having done so, it would be bad faith for them now to dispute his title or right to the land for the purpose of retaining a possession thus acquired. We are, of course, construing the evidence most favorably to the plaintiffs, as we should always do in the case of a nonsuit, making all reasonable inferences in their favor. The rule, as stated in *Brittain v. Westall,* 135 N. C., 492, and approved in *Deppe v. R. R.,* 152 N. C., 79; *Freeman v. Brown,* 151 N. C., 111, and other recent cases, is as follows: "The evidence must be construed in the view most favorable to the plaintiff, and all the facts which it tends to prove and which are an essential ingredient of the cause of action must

be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony." The jury might fairly and reasonably infer from the evidence that defendants had entered into possession as the agents of Canady, who conveyed to plaintiffs, and are estopped now to question his title, not having placed themselves in a position to do so. *Springs v. Schenck,* 99 N. C., 551. They must first give up that possession which they have thus acquired before being allowed to assert their awn title to the land, if they have any; otherwise, they would be permitted to take advantage of their own wrong and acquire an advantage over the plaintiffs to which they are not entitled according to the plain rules of fair dealing.

We do not say that there is no other evidence upon which, if believed, the plaintiffs might recover, but we will make no further reference to the same, as the evidence of the agency was sufficient to carry (650) the case to the jury.

The nonsuit will be set aside and a new trial ordered.

New trial.

J. B. HERNDON ET AL. V. DURHAM AND SOUTHERN RAILROAD COMPANY.

(Filed 26 March, 1913.)

1. Parol Contracts—Statute of Frauds—Pleadings—Evidence—Objections and Exceptions—Easements—Deeds and Conveyances—Prescription.

A parol contract relating to land is voidable, and not void, and, when executed, not denied, and the statute of frauds not pleaded, and the evidence to prove it is not objected to, the statute requiring it to be in writing has no application.

2. Deeds and Conveyances—Prescription—Railroads—Easements—Rights of Way—Parol Contracts—Statute of Frauds.

Where for mutual considerations a railroad company in acquiring a right of way has entered into parol agreement with the owner to construct an underpass or cattle-run under its track for the use of the owner whose land lay on both sides of the railroad, and which has been fully executed, and subsequently the railroad company attempts to close up the runway, which plaintiff seeks to enjoin, the interest claimed by the plaintiff is an easement in the lands which cannot pass except by deed or prescription.

3. Parol Contracts—License Over Lands of Another—Revocable at Will.

Where a right is claimed in the land of another resting in parol, whether treated as an easement or a license, it must be established by deed or prescription; for it is held that a license of this character, though based upon a valuable consideration, can be withdrawn at will.

4. Injunction—When Evidence Sufficient.

Where the main purpose of an action is to obtain a permanent injunction, and the evidence raises serious question as to the existence of facts which make for plaintiff's right and sufficient to establish it, a preliminary restraining order will be continued to the hearing.

5. Parol Contracts—Statute of Frauds—Frauds in the Procurement—Benefits Retained—Repudiation in Part—Equity.

Where a contract concerning an easement in lands, required by the statute of frauds to be in writing, rests in parol, and it is shown that it was procured by fraud of the party seeking to avoid it, he will not be permitted to retain the advantage he has derived under it and repudiate the other part of his agreement.

6. Same—Railroads—Easements—Principal and Agent — Ratification—Evidence—Injunction.

The agent of a railroad company procured a deed to a right of way over the lands of the owner, and there was evidence tending to show, as a part of the consideration of the deed, that the parties had agreed by parol that the railroad should construct a siding on the lands and perpetually keep open an under-pass or cattle-run under the track for the owner's convenience, and furnish wire to inclose a pasture for cattle along the right of way granted. The company furnished the wire, constructed the underpass, and subsequently attempts to fill up the underpass. In a suit seeking a permanent injunction, the defendant company pleads the statute of frauds and denies the authority of its agent to make the contract alleged. There was further evidence on plaintiff's behalf that he requested that the agreement be put in writing, was informed by the defendant's agent that it would be unnecessary, that the defendant would keep its agreement, and that, if otherwise, the laws of the State would compel it to do so, which the plaintiff, being without legal counsel, believed and acted on: *Held*, the compliance by the defendant with the terms of the parol agrement was evidence of ratification of the contract made by its agent; the plea of the statute of frauds, with the other circumstances of this case, was evidence of fraud in the procurement of the deed for the right of way, which if established would set it aside; and to preserve the *status quo* of the parties, a restraining order should be granted to the hearing.

7. Railroads—Rights of Way—Deeds and Conveyances—Fraud—Cancellation—Equity—Condemnation—Measure of Damages.

Where a railroad company has procured a deed for its right of way from the owner of the lands by fraud, the latter is entitled to have the deed canceled, in which case the former would be left to its right of condemnation, wherein it would have to pay for all damages, which, in this case, would include those arising to the plaintiff in having his pasture divided by the roadbed, without means of passage by his cattle from one part of the plantation to the other.

CLARK, C. J., concurring.

APPEAL from *Carter, J., from* an order signed at chambers, 1 March, 1913, from WAKE. (652)

This is an action to restrain the defendant from closing a passway under its track, leading from one part of the plantation of the plaintiffs to another part.

The plaintiffs' affidavit, used in the application for a restraining order, states in substance that they are the owners of the land described, containing about 250 acres; that in the year 1904 or 1905 the defendant surveyed across said land for the purpose of locating its line, and applied to the plaintiffs for the purchase of a right of way, through G. E. Lemmons, its chief engineer and superintendent; that the plaintiffs agreed to sell, but demanded $400 therefor, stating as a reason for demanding so much, that the running of the railroad across their lands, splitting said lands open, and cutting their plantation in two, would be a great disadvantage, and that there would be great danger to their horses and other cattle in passing across said railroad track; that the said Lemmons said the price was excessive, but finally agreed that the said railroad company would give $10 an acre for the land actually occupied by said railroad right of way, and as a further consideration and inducement would contruct a siding for the shipping of timber and other products from the farm, and would build an underpass or cattle-run under the track of said railroad for the use of the plaintiff, and would furnish wire to inclose their pasture, because the right of way traversed the said pasture; that plaintiffs thereupon executed their deed for said right of way; that they told said Lemmons at the time that they wanted some instrument of writing going to show and binding said railway company that said company would carry out its part of said contract, that is, would build said siding and would construct said underpass and would allow the same to remain open for all time for the plaintiffs; that said Lemmons assured them that any statement of this part of the agreement in writing was not necessary, and that the railway company would

(653) leave said underpass and would maintain the same for all time; that furthermore said Lemmons said that the railway company, after building said underpass, would not be able to close same, but that the law of North Carolina would cause said railway to keep said underpass open and would prevent forever said railway company closing up said underpass without the consent of plaintiffs; that plaintiffs were not acquainted with the terms of the law, and relied upon the assurance and representations and statements of the said Lemmons, the official and agent of said railway company; that, relying upon the representations and assurances made by said Lemmons, the plaintiffs signed said deed conveying the right of way, and were paid the sum of $10 an acre, aggregating an amount slightly more than $100; that defendant railway company built its road through said land and constructed said siding

and the underpass on said land and furnished the said pasture wire, as had been agreed upon, and the underpass has been used and is now used for the passing and repassing from one side of the farm to the other, and for the passage of horses and cattle there through; that the defendant is now threatening to close said passageway.

A temporary restraining order was issued, and on the return day the defendant filed the affidavit of the vice-president, stating that the defendant had acquired its right of way by the deed of the plaintiffs; that across this right of way acquired of the petitioners there is a drain over which defendant built a trestle, and the defendant has found it necessary, as a matter of safety and economy, to put a large pipe under said trestle to carry the water flowing under same and fill said trestle; that if the agreement was made by said Lemmons, he had no authority to do so; and that said agreement, if made, was void under the statute of frauds.

The defendant did not deny the making of the agreement or its knowledge that it had been made, or that it had been fully performed.

His Honor continued the restraining order to the final hearing, and the defendant excepted and appealed.

W. L. Foushee and Manning & Kitchin for plaintiffs.
Fuller & Reade for defendant.

ALLEN, J. A parol contract relating to land is not void, but voidable, and we have held that, when executory, it may be (654) enforced if it is not denied that the statute is not pleaded, and the evidence to prove it is not objected to (*Henry v. Hilliard,* 155 N. C., 378), and that, when executed, the plea of the statute of frauds is no longer applicable. *Choat v. Wright,* 13 N. C., 289; *Hall v. Fisher,* 126 N. C., 208.

Upon the strength of these authorities, the ruling of his Honor might be sustained upon the ground that the agreement of the superintendent has been performed, but for the fact that an easement, such as that claimed, cannot pass except by deed or prescription, and as there is no deed for the cattle-way under the track, and it has not been used long enough to confer the right by prescription, the agreement as to the easement has not been executed.

Treated as a license, the position of the plaintiffs is no stronger. The weight of authority seems to be in favor of the proposition that a license based upon a valuable consideration cannot be withdrawn at will, and certainly not without compensation (*Ricker v. Kelly,* 10 Am. Dec., 40; *Rinch v. Kern,* 16 Am. Dec., 501; *Mumford v. Whitney,* 30 Am. Dec., 71, and notes in annotated edition), but our Court has adopted the

view to the contrary. *McCracken v. McCracken,* 88 N. C., 272; *Kivett v. McKeithan,* 90 N. C., 107; *R. R. v. R. R.,* 104 N. C., 658.

We do not think, however, the plaintiffs are without remedy upon the facts as they now appear, and "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right and sufficient to establish it, a preliminary restraining order will be continued to the hearing. *Hyatt v. DeHart,* 140 N. C., 270; *Harrington v. Rawls,* 131 N. C., 39; *Whitaker v. Hill,* 96 N. C., 2; *Marshall v. Commissioners,* 89 N. C., 103." *Stancill v. Joyner,* 159 N. C., 617.

(655) If the allegations of the plaintiffs are true, the contract for the purchase of the right of way made by an agent of the defendant, and the consideration for the deed was the agreement to pay $10 an acre for the land occupied, to construct a siding on the land, to furnish wire for a pasture, and to keep open permanently a passway under its track to enable the plaintiff's cattle to pass from one part of their plantation to another part.

The defendant has accepted the deed based upon this agreement, and is now claiming under it, and there is evidence that it had knowledge of the agreement, and has ratified it, as otherwise it would not have performed it by furnishing wire, etc.

If so, the law will not permit the defendant to retain the benefit of the contract and repudiate its obligations. *Rudasill v. Falls,* 92 N. C., 226; *Brown v. Davis,* 109 N. C., 28; *Christian v. Yarborough,* 124 N. C., 76.

In *Rudasill v. Falls, supra,* the Court, quoting from several authorities, says: "'The principal cannot of his own mere authority ratify a transaction in part and repudiate as to the rest,' is the language of *Mr. Justice Story* in section 250 of his work on Agency. 'He must either adopt the whole or none.' Another recent author lays down the same doctrine thus: 'A nullification must extend to the whole of a transaction.' So well established is this principle, that if a party is treated as an agent in respect to one part of a transaction, the whole is thereby ratified. From this maxim results a rule of universal application, that where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made 'cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity.' Ewell's Evans' Agency, 70 (Ed. 1889), p. 95). The rule rests upon sound reason and abundant authority. *Crawford v. Barkley,* 18 Ala., 270; *Hodnett v. Tatum,* 9 Ga., 270; *Bank v. Hanner,* 14 Mich., 208; *Coleman v. Itache,* 1 Ore., 115.'

Again, if the agent exceeded his authority and the defendant had no knowledge of the agreement, there are facts alleged which, if true, are sufficient to justify the court in maintaining the *status quo* until the final determination of the action. The plaintiffs alleged that the agent made the agreement for the defendant, and that they demanded that it be reduced to writing; that the agent told them a writing (656) was unnecessary, and that the defendant would leave said pass-way and would maintain it for all time; that said agent further represented that the law of North Carolina would not permit the same to be closed; that they executed their deed relying upon these representations, and the defendant says the agent had no authority to make the agreement or the representations.

A promise is usually without the domain of the law unless it creates a contract, but if made, when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground of relief. *Hill v. Gettys,* 135 N. C., 375; *Braddy v. Elliott,* 146 N. C., 582.

In the *Hill case* the Court ordered the cancellation of a mortgage because of a fraudulent promise, and in the opinion quotes with approval the following excerpts from text-books and decisions: "The general rule in regard to promises is that they are without the domain of the law unless they create a contract, breach of which gives to the injured party simply a right of action for damages, and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it, and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact. 1 Bigelow on Fraud, 484. (The author is discussing, of course, civil remedies.) 'When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense.' *Goodwin v. Horne,* 60 N. H., 485. 'The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it.' *Des Farges v. Pugh,* 93 N. C., 31; 53 Am. Rep., 446." (657)

In the *Braddy case* there was an exchange of land, and the defendant agreed, as a part of the consideration, to erect two dwellings and outhouses on the land conveyed to the plaintiff, and failed to do so.

The issues submitted to the jury were answered in favor of the plaintiff, and in discussing the effect of the verdict the Court says: "If the jury should find, in addition to their findings on the first and second issues, that the defendant fraudulently induced plaintiffs to agree to the exchange by falsely representing and pretending that he would build two suitable dwellings and necessary outhouses on the tract of land, such finding would be an ample basis for the decree canceling the entire transaction. . . . The subsequent acts and conduct of a party may be submitted to the jury as some evidence of his original intent and purpose, when they tend to indicate it."

When we consider the assurances of the agent to induce the plaintiffs not to insist upon reducing the agreement to writing, the representations made by him, and the fact that he had no authority to make any agreement or representation, if the allegation of the defendant is true, we are of opinion there is evidence of fraud, and that the defendant cannot retain the fruits of it.

If so, the plaintiffs would be entitled to a cancellation of their deed, and the defendant would have to resort to condemnation proceedings to acquire a right of way, and the right to the passway under the track, if reserved in the deeds, would likewise have been subject to condemnation, if necessary to insure the safety of its roadbed.

We have not discussed the interesting question presented by plaintiff's counsel as to a right to cross the track of the defendant, arising by implication, as it is not necessary to do so as the case is now presented, but there is much respectable authority in support of their contention. Jones Easements, sec. 306; *Powell v. R. R.*, 215 Mo., 352; *Corea v. Higgnorra*, 17 L. R. A. (N. S.), 1019; *Ritchey v. Welch*, 149 Ind., 217; *Uhl v. R. R.*, 47 W. Va., 59; *Fritz v. Tompkins*, 168 N. Y., 524;
(658) *R. R. v. Commissioners*, 162 Mass., 83; *Powers v. Heffernan*, 233 Ill., 603.

Upon a review of the whole case, we are of opinion that it was proper to continue the restraining order until the facts can be determined.

Affirmed.

CLARK, C. J., concurring: In a case like this, no express agreement either oral or written, is required to sustain a claim for a pass under the railroad track through an embankment. If a railroad splits a farm open, whether it acquires its right of way by condemnation or by conveyance, the owner has a reservation, without express words, from necessity and by implication of law. Such passways are necessary to preserve the proper use and enjoyment of the land. The law presumes that a vendor did not intend to convey a portion of his land in such a way as to deprive himself of full use of the remainder. 23 A. and E.,

16. In this case the vendor sold a strip of land, 1,400 feet long for $103, splitting the farm open. It is inconceivable that he did not retain a private way under the railroad where there was a fill which isolated the two sides of the farm, unless he understood that he would have the right to an underpass. Though no writing was taken, signed by the defendant, it could not have been contemplated that the defendant could compel the vendor to go miles around to reach the land on the other side of the railroad.

As there was already a farm road there by which the landowner could pass from one side of the farm to the other, when the fill was thrown up the right remained to have a gap left for the continuance of this farm way, without any written agreement, and in fact it was so left for years until this attempt to close it up. Indeed, Revisal, 2601, expressly provides that any railroad crossing a plantation road "shall make and keep in constant repair crossings" for any plantation road and other roads. This applies as much to underpasses where there is a fill, and to bridges overhead where there is a cut, as to a grade crossing. The statute is provided to prevent inconvenience to adjacent landowners in the use of their farm roads in the same way that the railroads are required to maintain crossings for public roads, (659) highways, and farm roads. Revisal, 2566 (5), 2568, 2569.

Indeed, the policy of the law is not to abolish underpasses, but to favor them, or overhead bridges where there is a cut, and to abolish grade crossings. To this end the Corporation Commission is authorized to require, when they think proper, the lowering or raising of any track or highway. Revisal, 1097 (10). The whole subject of the duty of railroad companies to so construct their roads as not to interfere with the use of any public road or private way is fully discussed, with citation of authorities, in *R. R. v. Goldsboro,* 155 N. C., 360, 361. Besides this, Elliott Railroads, sec. 1138, says: "The rule, however, is that a deed to a railroad company does not constitute a waiver of a right of way to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance."

"Where an agreement by the vendee to give a vendor a pass way over other land forms a part of the consideration for the sale and conveyance of land, and the vendee is placed in possession of the land, and the vendor is placed in the use of the passway, the former will not be allowed to prevent the latter from using the passway upon the ground that the contract therefor was within the statute of frauds, as a court of equity will not allow the vendee to hold the land and refuse to pay for it." *Champion v. Monday,* 85 Kentucky, 32.

In *R. R. v. Commissioners,* 162 Mass., 81, where the vendor had conveyed a strip of land through his farm, without any reservation, to the railroad company, the Court held: "The law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way, of necessity, over the portion granted, applies to conveyances to a railroad company by a warranty deed which says nothing about a right of way across the land conveyed. . . . And the fact that the railroad provided and maintained a farm crossing for him for many years (660) indicates that a clause releasing damages was not understood to apply to his right of way."

It seems clear, therefore, that aside from the evidence tending to show an express agreement, the plaintiff had an implied right to retain the passway so that the communication between two sides of his farm should not be interrupted by the fill. That an interval under such fill was not impracticable is shown by the fact that for many years the underpass continued. Further, it is in accordance with the policy of our law, as declared by repeated statutory enactments cited above, that the construction of a railroad shall not interfere with the use of highways, cartways, private ways, or other methods of communication. Not only existing roads and highways are not to be interfered with by fills or cuts, but even when the railroad track crosses a local road or highway or a farm way on a grade, the Corporation Commissioners have ample authority to require the railroad track to be raised or lowered so as to abolish grade crossings. Revisal, 1097 (10).

The Revisal, 3753, makes it an indictable offense for any railroad to fail to make and keep in constant repair crossings to any plantation road thereupon. The whole subject of the duty of railroads in regard to these plantation roads which are crossed by their track is fully discussed in *Goforth v. R. R.,* 144 N. C., 571, and we need not repeat what is there said.

Cited: Tate v. R. R., 168 N. C., 525, 528.

(661)

W. C. BINFORD ET AL. v. S. S. STEELE.

(Filed 9 April, 1913.)

1. Deeds and Conveyances—Parol Contracts to Convey—Escrow—Condition Precedent—Offer to Sell—Acceptance—Payment.

Where a principal, acting on a parol agreement made by its agent, executes a deed to lands and delivers it into his agent's hand for delivery upon payment of the purchase price, the transaction is an offer to buy, and an acceptance with the condition precedent that the purchase price is first to be paid; and this condition is not performed by a part payment and an agreement between the purchaser and the agent that the latter will retain possession of the deed and deliveer it upon the payment of the balance of the price.

2. Deeds and Conveyances—Parol Contracts to Convey—Principal and Agent—Escrow—Offer to Sell—Acceptance—Withdrawal of Offer—Payment—Notice.

Where a proposed purchaser of lands does not pay the full purchase price therefor to the seller's agent upon the latter's tendering a deed, when payment in full is a condition precedent to the delivery, and thereafter the seller withdraws his deed from his agent's possession, and the purchaser, knowing the deed had been withdrawn, pays the balance which was to have been due by him under the arrangement between him and the agent, in his action against the seller to recover the purchase price he has thus paid to the agent, and which the agent has retained, he is not entitled to the money represented by his first payment, for he has not complied with the condition precedent to the delivery of the deed; nor the balance of the purchase money, for this he had paid after he had knowledge that the agent's authority had ceased.

3. Deeds and Conveyances—Escrow—Principal and Agent—Contracts to Convey—Withdrawal of Offer—Notice—Payment—Pleadings—Evidence.

Upon the question of whether a purchaser of lands had notice of an agent's limited authority in delivering the deed unless the purchase money was paid in a specified time, and that failing this payment the seller had withdrawn the deed from his agent's hands, an allegation of the purchaser, in his complaint in an action to recover money he had since paid to the agent, that the deed had been withdrawn, is some evidence of his knowledge thereof; and his evidence that he did not remember having made the statement only affects its credibility.

4. Deeds and Conveyances—Contracts to Convey—Offer to Sell—Escrow—Principal and Agent—Withdrawal of Deed—Notice—Evidence—Revocation.

Where by delivering a deed to his agent in pursuance of a parol proposition to buy his lands, the seller has in effect offered to sell them, he may withdraw his offer, nothing else appearing, at any time before the purchaser's final acceptance by payment of the full amount of the agreed purchase price; and where the seller has withdrawn his deed, before payment, from the hands of his agent, with the knowledge of the purchaser, the withdrawal of the deed is some evidence of notice to the purchaser that the offer had been revoked.

(662) APPEAL by defendant from *Peebles, J.*, at December Term, 1912, of RICHMOND.

This action was brought to recover $250, which plaintiff alleged that he had paid to M. A. Land, agent of defendant to sell him Lot No. 77 in the plat of the W. C. Leak lots in Hamlet, N. C. Defendant denied his liability. The facts, so far as the court permitted them to be shown, were that Land, who lived at Hamlet and was engaged in the business of a real estate broker, notified the defendant that plaintiffs would give him $250 for the lot. Defendant told Land that he would make the deed to the lot for that price, provided the money was paid by 1 June, 1911. This offer was made in May, and, at the time, defendant caused a deed to be prepared for delivery to plaintiffs upon payment of the purchase money by the first day of June. There was no written agreement between the parties. Land took the deed to Hamlet and tendered it to plaintiffs, when the plaintiff W. C. Binford requested that he be allowed to take the deed and show it to his partner at Richmond, Va., for his examination, which was done, and the deed afterwards returned to Land, when plaintiffs paid Land $215 and requested him to deposit it and the deed in the bank until the balance was paid, which he promised to do. Plaintiffs, in August, paid to Land the balance of the purchase money, that is, $35, but Land did not have the deed with him, stating that it was in the bank, and that he would go to Rockingham and get it. The defendant offered to show that he had withdrawn the land from sale and taken the deed from Land, but the court excluded the testimony. Plaintiff testified, under cross-examination, that he had alleged in his complaint that Land told him that defendant, Steele, had the deed at the time he paid the balance of $35. The court charged the jury that, if they believed the evidence, they should find that defendant is indebted to the plaintiff in the sum of $250. Verdict and judgment were rendered accordingly, and defendant appealed.

M. W. Nash and John P. Cameron for plaintiff.
Lowdermilk & Dockery for defendant.

(663) WALKER, J., after stating the case: As there was no written memorandum of a contract to sell the lot, signed by the defendant or his duly authorized agent, the transaction must be treated as an offer by plaintiffs to buy the lot for $250, and an acceptance by the defendant upon the condition stated therein, which modified the terms of the offer, and if plaintiff had notice of this condition, or private instruction to Land, as it was called in the argument, there was no agreement, and this was conceded; but plaintiff contended that he was not bound by this condition, as he had no notice of it. If that be

admitted, for the sake of the argument, it appears that plaintiff had not complied with the stipulation of defendant's offer, which was known to him, that he should pay $250 for the lot before the deed should be delivered. He was not entitled to the deed upon paying less than the whole of the purchase money. As said in *Hardy v. Ward,* 150 N. C., 385, 392, when payment is the act of acceptance contemplated by the offer to sell land, it is a condition precedent to the vesting of any right in the vendee. There is some evidence in the case, as now presented, that plaintiffs knew the deed had been withdrawn by the defendant, for Binford testified it had been so alleged in his complaint. It is true, he further said that he did not remember having made this statement, but that did not destroy the legal effect of the admission or the statement of the fact, but merely affected its weight before the jury. It was still competent as a declaration by him. This being so, there was evidence that he paid the $35 in his own wrong, that is, with knowledge of the fact, or circumstances which put him on notice as to it, that defendant had withdrawn the deed and revoked the sale. Plaintiffs were bound to know that by paying only a part of the price they acquired no right to the deed. If the deed had remained in the possession of Land, they might rightly have assumed that his agency still continued. When they handed the $215 to Land and trusted to him as their depository to hold the money in bank and the deed until it suited them to pay the balance, they were doing something contrary to the terms of defendant's offer, and they took the risk of a compliance with his promise by Land and the continuance of his agency, for defendant had the right to withdraw his offer to sell at any time before final acceptance (664) of it by payment of the full amount of the purchase money. 39 Cyc., 1194; *Winders v. Kenan, ante,* 628. The last cited case differs from this one only in the form of the transaction. In that case there was a written option or offer, while in this there was an offer arising out of the deposit of the deed with Land for delivery when the whole of the price should be paid, but subject to withdrawal of the deed or revocation of the offer at any time before its final acceptance, there being no fixed or specific time for plaintiff to pay, and no consideration. The withdrawal of the deed was, at least, some evidence of notice to him that the defendant's offer had had been revoked. There was an effectual way by which plaintiffs could have protected themselves, as well as the defendant, against any default of Land, and that was by tendering the whole amount and demanding a deed, as they had the right to do. "A tender of the purchase money, however, in connection with mutual and concurrent promises by the vendor, means merely a readiness and willingness accompanied with an ability to produce the

money, provided the vendor will concurrently do the act which is required of him; and hence a purchaser in making a tender need not part with the money until he receives the conveyance, and in such a case he may make his offer or tender on condition that the vendor will execute a valid deed to the property bought." 39 Cyc., 1563. *Blunt v. Tomlin,* 27 Ill., 93; *Comstock v. Lager,* 78 Mo. App., 390. In the two cases just cited, the Court held that "he who tenders for a deed, need not part with his money till he can touch the deed, so he need run no risk for the safety of his money." If this be true, the defendant insists that the plaintiff should not be allowed to put a risk upon him which they could have avoided so easily by an exact compliance with his offer and by not parting with their money until they received the deed; that by not pursuing this simple method they have brought the trouble upon themselves, and it can make no difference that they did not have all the money when the deed was in Land's possession and at the time he tendered it to them, for that was their misfortune and not defendant's fault. This is a very plausible, if not a strong position, but we
(665) will not now decide whether it is a correct one, as the facts have not been fully developed. It may be the jury will find, upon all the facts and circumstances, that the deed had been withdrawn with plaintiffs' knowledge or with actual or constructive notice to them. If they knew that defendant had revoked the offer when they paid the $35, and that Land's authority had ceased, they should not have paid it, but under the charge of the court this amount was included in the verdict.

It will not be contended that plaintiffs can recover anything if they had notice in fact or in law of the restriction upon Land's authority, or if at the time of the payment of the $215 the deed had, in fact, been withdrawn to plaintiffs' knowledge. Binford testified that Land had it at that time, but defendants should be allowed to show that he did not, if they can.

We think the defendant was unduly handicapped by the ruling of the court excluding evidence as to the withdrawal of the deed, and that the charge was too broad. The case should, therefore, be retried, so that all the facts may be disclosed, and the rights of the parties determined under proper instructions.

New trial.

GEORGE W. SUTTON v. JOHN W. SUTTON.

(Filed 2 April, 1913.)

Deeds and Conveyances—Escrow—Trespass on Lands—Injunction—Disputed Facts—Injury to Lands.

Where in an action to recover lands an injunction is sought, as a part of the relief, for a continuous trespass upon the lands, and it is put in issue as to whether a deed from the plaintiff's deceased mother, under which he claims, was placed in escrow to be delivered unconditionally upon her death, or whether it was to be held in escrow until the payment of her debts, of which there were several outstanding and constituting claims upon her estate, and it is claimed that under the conditions of the escrow the defendant was to manage the lands and pay the debts out of the rents and profits, it is *Held*, that upon these disputed facts, and it appearing that pending the litigation the threatened acts of defendant would produce injury to the plaintiff, a restraining order should issue to the hearing. Revisal, secs. 806, 807. *Semble*, as in this case the court had required the plaintiff to pay his share of the debts against the estate, the defendant could not be prejudiced by the restraining order.

APPEAL by defendant from restraining order of *Cline, J.*, (666) heard at chambers, by consent, at Wilson, 13 February, 1913; from LENOIR.

This is an appeal from an order granting an injunction to the hearing, forbidding defendant from trespassing on the lands of plaintiff. The plaintiff alleges that his mother, Mrs. Sarah C. Sutton, on 21 January, 1898, executed a deed for the land to him and deposited the same with a third person in Lenoir, to be delivered absolutely to him at her death, while defendant alleges that this deed, with deeds similarly executed to another child and a grandchild, were deposited with defendant, upon the condition "that defendant should take, hold, and keep the said deeds until after her death, and thereafter until all the debts against her estate, including the mortgage set out in the complaint, were fully settled and paid and her estate settled according to law; and that the defendant should, during said time, hold, manage, and control said lands until the rents and profits therefrom should be sufficient to settle and discharge all debts and liabilities against her said estate, and thereafter he should deliver said deeds." He further alleges that the estate has not been settled, and that there are still outstanding liabilities of Mrs. Sutton to be paid. Mrs. Sutton died 31 August, 1912, leaving a will in which she refers to the deeds as having been executed. Defendant has qualified as her administrator, with the will annexed. Plaintiff alleges that defendant has threatened to continually trespass upon the land unless his demand for the possession thereof is complied with by the plaintiff.

It seems that the deeds were in the custody of the clerk of the court for some purpose, and thinking he held them officially, he probated and ordered them to registration, but afterwards, discovering his mistake and finding that he held them only as a depositary, and in his private capacity, he withdrew them from the register's office before they had actually been recorded on the book of registration. *Judge O. H.* (667) *Allen* granted an order to show cause why defendant should not be restrained and enjoined from committing the threatened trespass "pending the further hearing and the final determination of the matters in controversy," which was heard before *Judge E. B. Cline* on 13 February, 1913, by whom the injunction to the hearing was ordered. Defendant appealed.

G. V. Cowper for plaintiff.
Loftin & Dawson and Rouse & Land for defendant.

WALKER, J. As the facts are in dispute, the court properly continued the injunction to the hearing (*Stancill v. Joyner,* 159 N. C., 617; *Cobb v. Clegg,* 137 N. C., 153; *Hyatt v. D'Hart,* 140 N. C., 270), as it appears in this case that the commission of the threatened acts of defendant would produce injury to the plaintiff pending the litigation, and that the trespass by the defendant would be continuous, and that the restraint of the said acts is, at least, a part of the relief sought in the action. Revisal, secs. 806 and 807; *Lumber Co. v. Cedar Works,* 158 N. C., 161; *Foster v. Carrier, ante,* 472. But we do not see how the defendant will be materially prejudiced by the order, as the court expressly required plaintiff to pay his share of the debts and liabilities of the decedent, and reserved the right to proceed against the plaintiff for a sale of the land by petition, as allowed by law, if it should become necessary to sell the land for the payment of debts against the estate. What more could he ask for? His hands are not tied, but set free, so that he may proceed to do practically all that, as he alleges the testator instructed him to do when she deposited the deeds with him. We do not pass upon the merits of the case, as the jury may find, or it may be otherwise determined, that plaintiff is entitled, unconditionally, to the possession of the deed she made to him, and the merits are not now otherwise directly involved. Our decision is, therefore, confined to the correctness of the judge's order, in which no error is found.

No error.

(668)

J. J. ROBINSON ET AL. v. CITY OF GOLDSBORO.

(Filed 9 April, 1913.)

Cities and Towns—Bond Issues—Necessary Expenses—Vote of the People—Constitutional Law—Injunction.

Where the proceeds of a proposed issue of bonds of a municipality is for the payment of an accumulation of items spent for the necessary purposes of the city, and for the purposes of properly equipping and maintaining its fire department for the safety of its citizens' property, and for the repairing and keeping in proper condition its own streets, the purposes of the issue are for the city's necessary expenses, not requiring that the issue of bonds be submitted to the vote of the people to be valid; and it appearing that the constitutional requirements that the readings on separate days upon the "aye" and "no" vote have been observed, their issuance may not legally be enjoined.

APPEAL by plaintiffs from *Carter, J.*, on refusal to grant a restraining order, heard at chambers 25 March, 1913, from WAYNE.

This is an action brought by the plaintiff, a taxpayer and citizen of the city of Goldsboro, in his own behalf and in behalf of other citizens and taxpayers, to restrain the issuing of certain bonds and the levying and collection of certain taxes to pay the interest thereon, and to provide a sinking fund for the payment of the principal. The plaintiff alleges:

Second. That the plaintiff is a citizen and taxpayer of said city.

Third. That the defendants caused to be passed by the General Assembly of 1913 a certain act authorizing the board of aldermen of the city of Goldsboro to issue $83,000 in bonds for the following purposes: $15,000 for funded indebtedness, heretofore contracted for sewerage improvement and extension by said city, to run for not exceeding thirty-seven years; $36,000 for waterworks improvements, to run for not exceeding thirty-eight years; $9,000 for fire department protection, to run for not exceeding thirty-three years; and $23,000 for street improvements, to run for not exceeding forty years.

Fourth. That for the purpose of providing for the payment of the interest accruing on and the principal at maturity of all of said bonds, said act provides for said board of aldermen to levy and (669) lay a particular tax on all persons and subjects of taxation which the board of aldermen now or may hereafter be authorized to levy and lay taxes for any purpose whatever; said particular tax not to be more than 11 cents on the $100 assessed valuation of property and not more than 33 cents on the poll.

Fifth. That the question of issuing the bonds provided for in said act has not been submitted to the qualified voters of the said city, and

that the board of aldermen of said city are preparing to issue said bonds without the submission to the said voters.

Sixth. Upon information and belief, that the defendants have no power to issue said bonds or to levy and collect the taxes provided for in said act of the General Assembly; the proposed bonded indebtedness of said city is not for necessary expenses, and that the said bonds will, if their issuance is not restrained, impose an indebtedness upon said city not authorized by the qualified voters, to run for the respective number of years as set forth in said act of the General Assembly.

Seventh. That the board of aldermen of said city are elected for a term of two years, and that the term of office of the present board will expire in May, 1913. That the population of said town is approximately 8,000; that the assessed valuation of all real and personal property within the corporate limits is approximately $4,500,000. That the rate of taxes now levied by the board of aldermen of said city is 94 cents on the assessed valuation of real and personal property and $2.82 on each poll.

The defendants answer, and among other things, allege:

First. That for the past three years or longer there have been increasing demands upon and applications to the board of aldermen of the city of Goldsboro for the enlargement and extension of the waterworks plant and system; for better and safer equipment to the city's fire department; for the repairing and paving of certain streets, needing the same in said city. That realizing and seeing the necessity for the aforesaid improvements, the board of aldermen of said city did, at its
(670) meeting held on 4 December, 1912, adopt a resolution directing the mayor to appoint a committee of five to take under consideration the amendments that they deemed wise and advisable to the city charter, and report their suggestions and findings to another meeting. The mayor appointed on said committee the following aldermen, to wit, Lionel Weil, W. D. Creech, C. B. Hall, G. P. Hood, and W. L. Peacock.

That said committee, after about six weeks study and work on those amendments to the city charter which appertained to the issuance of the bonds mentioned in paragraph third of the complaint (and hereafter set forth in full), did, at a meeting of the board of aldermen held 22 January, 1913, make its report and unanimously recommend the issuance of said bonds by said city for said improvements. On motion of Alderman Draper, seconded by Alderman Weil, the board unanimously adopted the report of the committee on charter amendments, and unanimously adopted the following resolution:

"*Be it ordained by the Board of Aldermen of the City of Goldsboro,* That Mayor John R. Higgins and City Attorney D. C. Humphrey cause

to be presented to the General Assembly of North Carolina, now in session, for enactment, the following bills:

"Whereas the city of Goldsboro is indebted in the sum of $15,000, contracted heretofore, for necessary expenses; and whereas the said city of Goldsboro desires to issue bonds in a sufficient amount to pay said indebtedness; and whereas the waterworks plant and system owned by the city of Goldsboro is, in its present condition, insufficient to supply the city and its inhabitants with the proper and needful supply of water; and whereas it has become a necessity that said waterworks plant and system be improved, enlarged, and extended; and whereas the city of Goldsboro desires to issue bonds in a sum not exceeding $36,000 to make the said necessary improvements, enlargement, and extension to the said waterworks plant and system; and whereas the fire department and system of the city of Goldsboro, in its present condition, is inadequate and insufficient to safeguard the interests of the city of Goldsboro and its citizens from loss by fire; and whereas it is (671) necessary that the said fire department and system have a safe and proper equipment of hose, wagons, trucks, and appliances; and whereas the said city of Goldsboro desires to issue bonds in an amount not exceeding nine thousand dollars, to properly provide and equip the said fire department and system; and whereas some of the principal streets of the city of Goldsboro, to wit, East Center Street, between Chestnut and Ash streets, between Walnut and Ash streets, as well as some of the other streets in said city, are in bad condition, being unsafe and unsighty, and need working, macadamizing, and paving; and whereas the same is necessary for the general betterment of the city of Goldsboro and its citizens; and whereas the city of Goldsboro desires to issue bonds in a sum not exceeding twenty-three thousand dollars in order to have said work, macadamizing, and paving effectuated on said streets: therefore,

"The General Assembly of North Carolina do enact:"

(The act of the General Assembly follows, authorizing the issuing of bonds in the sum of $15,000 to provide for floating debts theretofore contracted for necessary expenses; of bonds in the sum of $36,000 for enlarging and extending the waterworks system; of bonds in the sum of $9,000 for properly equipping and adding to the fire department; and of bonds in the sum of $23,000 for working, paving, and macadamizing the streets.)

Second. That the foregoing bill was regularly enacted by the General Assembly of North Carolina, session of 1913, the same having passed its several readings on three separate days, the ayes and nays being called

on the second and third readings of said bill and being entered on the journals of the House and Senate respectively; that the same conferred full power upon the said board of aldermen to issue the bonds therein set out; that said act is known as H. B. 1260 and S. B. 963.

Third. That the present tax rate of 94 cents on the assessed valuation of property and $2.82 on the poll will not be increased by the issuance of said bonds, this being brought about from the fact that (672) one of the city's bond issues will become due in July of this year and be paid by funds already in the hands of the commissioner of the sinking fund of the city of Goldsboro, for that purpose, by reason of which there is an available surplus property tax of 5 cents and a surplus poll tax of 15 cents. That there are also three other bond issues of said city now outstanding, from each of which a surplus of 2 cents property tax and 6 cents poll tax is available. That this available surplus tax makes a total of 11 cents property tax and 33 cents poll tax, this being the amount to which the board of aldermen are limited in said act for providing for the payment of the interest and principal of the $83,000 bond issue therein authorized.

Fourth. That there is nothing in the charter of the city of Goldsboro restricting the issuance of the said bonds. That section 27 of the city charter, passed by the General Assembly of North Carolina, chapter 397, Private Laws of 1901, reads as follows: "That among the powers herein conferred on the board of aldermen, they shall provide water, provide for repairing and draining of streets, regulating the market, take the proper means to prevent and extinguish fires. . . ."

Fifth. That all of the aforesaid bonds are for necessary expenses in and for said city. That the funded indebtedness of said city for which said act authorizes a $15,000 bond issue is the result of several years accumulation of necessary expenses incurred by said city, for sewerage extensions and improvements, the revenue from said city not having been ample to provide for the same. That the bond issue of $36,000 authorized by said act is for the purpose of enlarging and extending the waterworks plant and system of the city of Goldsboro. That the bond issue of $9,000 authorized by said act is for the purpose of properly equipping and adding to the fire department system of said city. That the bond issue of $23,000 authorized by said act is for the purpose of working, macadamizing, and paving some of the principal streets needing the same, in said city.

The cause came on for hearing upon a motion for a restraining order, and his Honor finding that the indebtedness of $15,000 was contracted for necessary expenses, and being of opinion that the other purposes for

which bonds were to be issued were also for necessary expenses, denied the motion, and the plaintiff excepted and appealed. (673)

Langston & Allen for plaintiff.
D. C. Humphrey for defendant.

ALLEN, J. The judge of the Superior Court has found as a fact that the indebtedness of $15,000 was contracted for necessary expenses (and we adopt his finding) and has correctly held that the other purposes for which it is proposed to issue bonds fall within the class of necessary expenses.

If so, the law does not require the question of issuing the bonds to be submitted to a vote of the people. *Faucett v. Mount Airy,* 134 N. C., 125; *Hightower v. Raleigh,* 150 N. C., 569; *Water Co. v. Trustees,* 151 N. C., 175; *Bradshaw v. High Point,* 151 N. C., 517; *Underwood v. Asheboro,* 152 N. C., 641; *Hotel Co. v. Red Springs,* 157 N. C., 137; *Murphy v. Webb,* 156 N. C., 402.

The provision in the act as to the rate of interest is in all material respects like the one considered and held valid in *Hotel Co. v. Red Springs, supra.* We have examined the charter of the defendant, and chapter 86, Laws 1911, and find nothing which affects injuriously the validity of the bonds, and are of opinion, upon the whole record, that the defendant has authority to issue the bonds set out in the complaint and answer, and to levy and collect the taxes for the payment of the bonds and interest thereon.

Affirmed.

(674)

J. J. IPOCK v. FREEMAN GASKINS ET AL.

(Filed 2 April, 1913.)

1. Deeds and Conveyances—Descriptions—Former Deeds—Calls—Mistakes—Question of Law.

Where upon the face of a deed it appears that a mistake has been made in locating one of its calls, which is readily ascertained from the further calls and descriptions contained in the instrument, as in this case, a call for the "west" side of a swamp when it unmistakably appears that the "east" side thereof was intended, and to carry out the description as written it would be necessary to extend two lines of the boundaries, while otherwise the boundaries would be perfectly described, the courts will correct the mistake thus evidently made, as a matter of law, so as to effectuate the plain intent of the parties; and this rule will also apply where one deed refers to a former deed in the chain of title

for description of the lands, so that, construed together, the mistake will be made apparent by reference to the description in the former deed.

2. Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Verdict—Harmless Error.

Where in an action to recover lands a mistaken call in the deed under which a party claims as color extends his lines so as to include the *locus in quo*, and the trial judge erroneously leaves it to the determination of the jury, upon the evidence, as to whether the call was a mistake, a verdict against the claimant upon the question of adverse possession, necessary to ripen his title, renders harmless the error committed by the court.

3. Deeds and Conveyances—Description—Calls—Questions of Law—Written Contracts—Parol Evidence—Equity.

Where the court corrects, as a matter of law, an evident mistake appearing in the face of a deed to lands, it is to effectuate the intention of the parties as it appears from the language of the conveyance itself, and the rule that a written instrument may not be varied by parol evidence, and the equitable principle applicable where the instrument itself is sought to be corrected, have no application.

4. Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Color—Harmless Error.

Where title to lands is claimed by adverse possession under a deed as color, the color of title cannot extend beyond the boundaries contained in the deed, and the land thus claimed must be located within the boundaries given; and hence, where it is evident, from the other parts of the description of the lands as contained in the deed, that a mistake has been made, so as to include the *locus in quo*, against the manifest intent of the parties, the one claiming it under color cannot go beyond the boundaries ascertained as a matter of law to be those of the land actually conveyed. *Rogers v. Mabee*, 15 N. C., 180, and *McConnell v. McConnell*, 64 N. C., 344, cited and distinguished.

(675) APPEAL by plaintiff from *Bragaw, J.*, at November Term, 1912, of CRAVEN.

This proceeding was brought for the purpose of processioning the lands of the parties, who are adjoining proprietors, and of ascertaining and declaring where is the dividing line between them. The case, in one view of it, turns upon the true location of the line which is first called for in the deeds, under which the plaintiff claims as color of title. The plaintiff introduced and read in evidence a grant from the State to Samuel Lawson for 200 acres of land, and offered evidence to prove that it covered the land in controversy, but there was no evidence connecting his deeds with this grant, so that he claimed the land altogether under color of title and adverse possession, and for this reason the proceeding was finally resolved into an action of ejectment. Plain-

tiff relied on a deed from Bryan H. Gaskins and others, heirs of David Gaskins, to Alonzo Gaskins and mesne conveyances to himself. They described the land as 225 acres beginning at a black gum, the first corner of the Lawson patent, and running with the west edge of the Shitton Bridge Swamp to Pamlico Road, thence north up the said road to a post oak, the dividing corner between Daniel Gaskins and Silas Gaskins in Bixley's patent, and thence to the beginning, "being a part of the land purchased by David Gaskins from James Gaskins." The deed from James Gaskins to David Gaskins, dated 13 November, 1856, and mentioned in the deed to Alonzo Gaskins, describes the land as beginning at the same black gum, which is the first corner of the Lawson grant, "and running with the edge of the swamp on the east side of Pamlico Road to a post-oak, the dividing corner between Daniel Gaskins and Silas Gaskins in the Bixley patent," sold by Levin Gaskins, and thence to the beginning, containing 125 acres. The post-oak is the same corner called for in the Alonzo Gaskins deed and the mesne conveyances from him to the plaintiff. The deed from Daniel Gaskins to James Gaskins, dated 19 June, 1833, describes the land as "beginning at the black gum, first corner of the Lawson patent in the mouth of the swamp, and running with the edge of the swamp on the east side to Pamlico Road, and thence with said road to a post-oak, the dividing corner between said Daniel Gaskins and Silas Gaskins, in Bixley's patent, sold by Levin Gaskins, and thence to the beginning, con- (676) taining 125 acres." There was evidence that the last two deeds covered the same land, and that the beginning corner in the deeds of the plaintiff was not on the west edge of the swamp, and to reach the west edge it would be necessary to run some distance across the north edge of the swamp; and further, that you would not reach Pamlico Road by running along the western edge of the swamp, as the two did not intersect, but the call for a line along the west edge would intersect the Cool Spring or Poley Bridge Road, which runs about east and west, the Pamlico or Core Point Road running about northeast and southwest and some distance away. The map used at the trial and before this Court shows this to be the case. In order to reach Pamlico Road, the line along the western edge of Shitton Bridge Swamp would have to be extended some distance along the edge of another swamp, called Poley Bridge Swamp or Branch.

Defendant introduced a deed from Daniel Gaskins to John S. Gaskins, dated 16 March, 1844, for a tract of land beginning at the mouth of Griffith Branch at the point 1, as indicated on the map, and running various courses to a stake on the northeast edge of Shitton Bridge Swamp, and thence down the same, which would be on its east edge, to

a gum in the edge of Gatlin's old millpond, and thence by various courses to the beginning. The defendants claim either as heirs of John S. Gaskins or by deeds from those who were his heirs. It was conceded that neither of the parties had shown any paper title connected with Lawson grant, and it was also admitted that the Lawson corner was at the black gum indicated by the letter A on the map. With reference to the calls of the deed from James Gaskins to David Gaskins, viz., "beginning at the black gum, first corner of Lawson's patent in the mouth of the swamp, *and running with the edge of the said swamp on the east side of Pamlico Road to a post-oak,*" and especially the last call, which is italicized, Henry Gaskins, one of the heirs of David Gaskins, and under whom the plaintiff claims by deed to David Cogden, as one of his mesne conveyances, testified:

(677) Q. There is the gum up there and there is the Pamlico Road down there (indicating). Don't you know, from Lawson's gum on the east side of Pamlico Road you couldn't run at all? A. It is evidently on the east side of the swamp to Pamlico Road. It is evidently a mistake of the draftsman—a mistake somewhere.

Q. You never claimed on the other side of Pamlico Road? A. No, sir; I never claimed on the south side of the road, or the east side, whatever you call it.

Q. Where is that deed, the original deed made to your father? A. I don't know.

Q. Which one of your children had it? A. I could not answer that question. I don't know.

There was much testimony as to the adverse possession of a part of the Shitton Bridge Swamp, the *locus in quo,* by the respective parties. The presiding judge explained the contentions in the case, and the questions arising upon the evidence, to the jury, defining what is meant in law by adverse possession sufficient to ripen color of title. He left it to the jury to determine whether the parties in the deeds of the plaintiff intended to call for the east or west edge of the swamp, for the purpose of settling a question of estoppel, as it was called, which arose between plaintiff, claining under Alfred Gaskins, and some of the defendants, claiming, from the same source, charging the jury that if the call in the deed of March, 1884, to Alonzo Gaskins, was not intended by the parties to run with the west edge, but with the east edge thereof, as contended by the defendants, there would be no estoppel as between the plaintiff and those of the defendants who also claim from Alfred Gaskins in the chain of deeds, as the said parties would not, in that case, claim the same land from a common source; but that, notwithstanding this finding, if made by the jury, they must consider the deed of Bryan

Gaskins and others to Alonzo Gaskins, dated March, 1884, as sufficient color of title for him to be ripened into a good title by the requisite adverse possession of the land, and plaintiff's right to their verdict would then depend upon the nature of his possession, to be ascertained by the jury under the evidence and the instructions of the court in regard thereto.

The jury returned a verdict in favor of the defendants, find- (678) ing that plaintiff's western boundary is the east edge of the swamp, and not, as contended by him, the west edge, and that said east edge of the swamp is the divisional line between plaintiff and defendants. Judgment was entered upon the verdict, and plaintiff appealed.

A. D. Ward for plaintiff.
D. L. Ward for defendants.

WALKER, J., after stating the case: It appears plaintiff from the undisputed facts of the case that the call in the plaintiff's deeds for the "west edge" of the swamp was a clerical mistake, and was clearly intended for the east edge, the word "west" having inadvertently been substituted for the word "east" by the draftsman. When this is shown to be the case, it has been held frequently in this and other jurisdictions that the court will itself rectify the error, by applying the call to the true line intended by the parties, when the other calls indicate the intention and the matter is free from any doubt or uncertainty. *Person v. Rountree,* 2 N. C., 378; *s. c.,* 1 N. C., 1. When passing upon a similar question in *Mizzell v. Simmons,* 79 N. C., 190, the Court held that where "the mistake is obvious and is fully corrected by the other calls of the deed and the plat annexed, it presents no difficulty, and the courts will construe 'east' to mean 'west,' to correct a mistake, when the intent of the parties appears, and the means of correcting it are presented," citing *Cooper v. White,* 46 N. C., 389; *Houser v. Belton,* 32 N. C., 358; *Campbell v. McArthur,* 9 N. C., 33. In the last cited case the Court fully approved this instruction of the court to the jury, that a mistake in a course or distance should not be permitted to disappoint the intent of the parties, if that intent appeared, and if the means of correcting the mistake are furnished either by a more certain description in the same deed or by reference to another deed containing a more certain description," and added: "So that I cannot think any difficulty will present itself in ascertaining the land intended to be conveyed by the deed, when recourse is had to the patent. The grantor has referred to this as the means of correcting any mistake in the (679) description of the land, and of ascertaining what his intent was in making the deed. (5 Wheaton, 359, 362.) Words shall always

operate according to the intent of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from necessity, of taking the deed most strongly against the grantor." It was held in *Houser v. Belton, supra,* that where a deed described a corner as being on the *east* side of a creek, it is admissible for the party to show, by competent testimony, that the corner was in fact on the *west* side of the creek; and that when there is a discrepancy between the course and other more certain descriptions in the deed, such as natural objects, the former must give way, it being so easy to make a mistake in giving the course, and the other calls being more reliable and certain. And in *Cooper v. White, supra, Judge Battle* stated it to be well settled that a mistake in the course called for in a deed shall not be permitted to disappoint the intent of the parties, if that intent appear and if the means of correcting the mistake are furnished, either by a more certain description in the same deed or by reference to another deed containing a more certain description, citing *Ritter v. Barrett,* 20 N. C., 266. The same doctrine was applied in *Davidson v. Shuler,* 119 N. C., 583, to the correction of what was termed "a slip of the pen" in writing "south" instead of "north," and in *Wiseman v. Green,* 127 N. C., 288, where it was held that the court undoubtedly has the right to construe a deed, and in proper cases to correct an inadvertence of the scrivener, "a slip of the pen," when it plainly appears from the deed itself so as to conform to the intention of the parties, and in that case "west," as it was written, was taken to mean "east," and the calls were accordingly so adjusted. It was said in *Kea v. Robeson,* 40 N. C., 373, that courts are always desirous of giving effect to instruments according to the intention of the parties, so far as the law will allow; so just and reasonable is this rule that it has long grown into a maxim, that favorable constructions are put on
(680) deeds. Commenting upon the use to be made of a reference by one deed to another, *Judge Gaston* said, in *Ritter v. Barrett, supra:* "The very purpose of the reference would seem to be to ascertain with more particularity what it was apprehended might not have been otherwise sufficiently described. They, therefore, declare their intent to convey unto John Sowell, the some land which Jacob McLindon sold to Isaac Sowell. If, therefore, in the description of the land thus conveyed there be found any inaccuracy or deficiency, that inaccuracy is corrected and that deficiency supplied the moment we ascertain the true boundaries of Isaac Sowell's purchase, and these appear upon the face of McLindon's deed." In *Gudger v. White,* 141

N. C., 515, referring to *Ritter v. Barrett,* we said: "This case was followed by *Everitt v. Thomas,* 23 N. C., 252, in which *Chief Justice Ruffin* says: 'We do not doubt that, by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of identifying the thing intended to be conveyed.' He further says that this is especially so when the calls of the two deeds, it turns out, are not inconsistent with each other, and there is a manifest intention by the latter deed to convey the whole or a part of the land described in the earlier one. In such a case the reference will be allowed to help an imperfect description, so as to make it conform to the principal intention." It has been thoroughly established that where one deed refers to another for a description, the latter must be taken as if embodied in the deed referring to it, and the two so construed together that the premises described in the first will pass under the second deed. *Gudger v. White, supra;* 4 Am. and Eng. Enc. of Law (2 Ed.), 803; *Hemphill v. Annis,* 119 N. C., 514. In *Gudger v. White, supra,* we resorted to these rules in the location of a dividing line or boundary between adjoining proprietors of land, and we may appropriately reproduce the language used by us in that case as strongly applicable to the facts of this appeal, as follows: "It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their (681) meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'" The rule thus stated has been more recently approved and adopted by us in several cases decided by this Court. *Bryan v. Eason,* 147 N. C., 284; *Triplett v. Williams,* 149 N. C., 394; *Acker v. Pridgen,* 158 N. C., 338; *Highsmith v. Page, ibid.* 226, and *Beacom v. Amos, ante,* 357, and numerous cases cited therein. It must not be supposed that this wholesome rule interferes with the principle that parol evidence is not allowed to contradict or vary a written instrument (*Moffitt v. Maness,* 102 N. C., 457), for there is no variation from the terms of the deed, but merely a correct ascertainment of them by con-

struing the entire instrument to get at the intent and effectuate it. We do not insert a term not in the deed for one that is here, for there is no process of substitution or alteration. That which renders the deed ambiguous and its meaning obscure, if allowed to stand by itself and considered alone, is merely viewed in the clear light of more certain and trustworthy provisions, and, if found to have been manifestly a mistake, the result of inadvertence, is discarded and not permitted to defeat the real intention of the parties, as otherwise expressed in the paper-writing. This is a most reasonable and practical rule, and has the great advantage of being also a very just one. Nor do we invade the province of a court of equity by correcting or reforming the instrument, which, of course, works a material change in it, to the extent of making a different contract than the one expressed in the language employed by the parties.

We are only saying what the parties meant by all they have said, (682) neither taking from nor adding to their agreement. The deed corrects itself, so to speak, by its own terms, and the pervading intention of the parties is fulfilled. Applying this principle to our facts, reconciling any apparent discrepancies, and seeking for the true intent in the deed, we find that the first call in the plaintiff's deed, after leaving the first corner at the black gum, or Lawson's corner, is for another physical object, the public highway, known as Pamlico Road, and that this road is so situated with its winding course, generally northeast and southwest, that it could not be reached by pursuing that call in the deeds along the west edge of the swamp, but that in order to reach it, it will be necessary to insert a long line, at the north end of the swamp, extending to its west edge, and at the south end another long line not mentioned in the deeds, as the west edge of the swamp does not coincide with or fit into either the call for the black gum, Lawson's corner, or the one for the Pamlico Road, but if you run from the black gum along the east edge of the swamp, it will intersect that road at the point in the Pamlico Road designated by the letter O in the map, and this will fit into the next call, "thence north up the road to the post-oak," and this can be done without any variation required by the substitution of lines not called for in the deeds. So far, this case presents reasons quite as strong and cogent for adopting the east edge of the swamp as the true line as any advanced in the cases we have cited, in support of a similar course taken in them. But plaintiff's deeds describe the land intended to be granted by them as the same, or a part of it, which was conveyed in the deed of James Gaskins to David Gaskins, and by a fair construction of that deed it conveys the same land as is described in the deed from Daniel Gaskins to David Gaskins, that is, they call for the line from the black gum along the

east edge of the swamp to the Pamlico Road and then up the road to the post-oak. If we should follow literally the calls in the deed from James Gaskins to David Gaskins, the land would be impossible of location, but it is perfectly manifest what the deed means. The word "of" was evidently intended by the draftsman for "to," so that when construed by its terms and the map, showing the different objects in their relation to each other, it conveys a tract of land beginning at the black gum and running thence with the east edge of the swamp to the (683) Pamlico Road, thence with the road to the post-oak, an admitted corner, and thence back to the beginning, containing 125 acres. This is in exact harmony with what is written in the preceding deed of Daniel Gaskins to James Gaskins, who conveyed to David Gaskins, and it also agrees with what plaintiff's own witness, Henry Gaskins, son of David Gaskins, said about it, that the call in the deed from James Gaskins to his father, David Gaskins, "is evidently meant for the east side of the swamp to the Pamlico Road," and the call, as it appears in the deed, that is, running (from the black gum) with the edge of the swamp on the east side of Pamlico Road to a post-oak, was also "evidently a mistake of the draftsman—a mistake somewhere," and further, he stated that those under whom plaintiff claims never asserted ownership to any land on the south side or east side of the Pamlico Road. It may be that the mistake was committed in copying the original deed on the registration book, as it appears that the registry was used and not the original. However it occurred, the deeds and map all show that the intended line was the east edge of the swamp. In *Houser v. Bolton, supra,* a corner was described as being on the *east* side of a creek, when the circumstances show it should have been on the *west* side, and it was held competent to show the mistake by competent proof, though it be parol testimony, citing the leading case of *Person v. Rountree, supra,* where *south* was read for *north,* because of a manifest inadvertence of the draftsman, by which the mistake occurred. The mistake in our case is obvious, and it should not, therefore, be allowed to prejudice the right of the defendants. *Bradford v. Hill,* 2 N. C., 30. *Johnson v. Bowlware,* 149 Mo., 451, was much like this one, and it was there held that, "Where a part of a description in a deed is inconsistent with the other parts, if sufficient remains from which the intention of the parties can be ascertained, that part which is repugnant may be rejected altogether. And this may be done in an action of ejectment. And if it is clear that the word 'west'—a call for the course—was by mistake of the scrivener written for 'east,' in a description which also calls for 'the place of beginning' in the same connection, that word will be rejected (684) as repugnant." See *Thatcher v. Howland,* 2 Metcalf (Mass.), 41; *Warden v. Harris,* 47 S. W., 834.

But the court instructed the jury that notwithstanding they found that the line ran with the *east* instead of the west edge of the swamp, the plaintiff's deed was color of title, and if he and those under whom he claimed had been in adverse possession for the time required to ripen title, he was entitled to recover. It was error to submit the question of the boundary, in this case, to the jury. What is a boundary is a question of law; where it is, a question of fact; but there was no dispute as to where it is, the only question being what it is, whether the east or west edge of the swamp, either of these two lines being easily located. The error, though, was cured by the verdict of the jury. *Vaughan v. Exum, ante,* 492; *Hardy v. Ward,* 150 N. C., 385. Color of title cannot extend beyond the boundaries of the deed constituting it (*Lumber Co. v. Swain, ante,* 566) and the land must be located within and embraced by the boundaries. *Marshall v. Corbett,* 137 N. C., 555. We suppose the court thought that the mistaken call for the west side of the swamp was sufficient to show good faith, and, therefore, could be considered as colorable title, under the accepted definition that color of title is that which in appearance is title, but which in reality is no title at all. *Knight v. Grimm,* 110 Va., 400. The particular instrument does not depend upon the belief of the claimant as to its sufficiency to confer title (*Reddick v. Leggett,* 7 N. C., 539; *Rogers v. Mabee,* 15 N. C., 180), but on its professing to pass a title, which it fails to do, either from want of title in the person making it or from the defective mode of conveyance employed, but it must not be so obviously defective that no man of ordinary capacity could be misled by it. *Tate v. Southard,* 10 N. C., 119; *Dobson v. Murphy,* 18 N. C., 586; *McConnell v. McConnell,* 64 N. C., 344. But adverse possession, nevertheless, cannot be extended beyond the boundaries fixed by the deed itself and its own language. The plaintiff, however, got the full benefit of the deeds as color, and cannot complain of this instruction. The jury found (685) against him as to the fact of adverse possession, and so far, therefore, as his title depends thereon, and not upon the alleged estoppel, he has lost upon the issue of fact under a charge free from error in that respect. There is also evidence that plaintiff acted in recognition of the defendant's title, showing that he knew where was the true boundary line of the land. There surely was sufficient and strong evidence to carry the case to the jury upon the question of boundary, if that was the proper way to try it.

A careful examination of the case leads us to conclude that there was No error.

Cited: Fowler v. Coble, 162 N. C., 502; *Richards v. Hodges,* 164 N. C., 188.

GEORGE E. GAYLORD v. M. E. McCOY ET AL.

(Filed 9 April, 1913.)

1. Deeds and Conveyances—Contracts to Convey Lands—Options—Consideration—Compliance.

An option for the sale of lands based upon a valuable consideration is an offer to sell which may not be withdrawn by the grantor before the expiration of the time provided in the option; and in order to constitute an acceptance, the optionee must not only indicate that he will accept, but he must also pay or tender the purchase price within the time limited, the option imposing this condition. *Winders v. Kenan, ante,* 628, cited and applied.

2. Same—Tender of Payment—Waiver.

Where the grantor of an option on lands given for a valuable consideration has refused to make a warranty deed according to the terms thereof, and by refusing to include certain lands embraced by his contract or pay off encumbrances he had agreed to pay, or to give bond for their payment as proposed by the optionee, a tender by the optionee of the purchase price within the period of time specified for the running of the option is unnecessary, and the refusal of the grantor to comply with the terms of the contract, in this manner, which he was obligated to perform, is a waiver of a legal tender of the purchase price; and the optionee, who has ever continued ready, able, and willing to pay, may enforce the contract according to its terms in his action thereon, and secure a proper deed upon the payment of the price agreed.

3. Deeds and Conveyances—Contracts—Options—Tender of Deed—Description—Requisites.

Where under an option to purchase land given for a valuable consideration the grantor tenders a deed which omits a part of the description of the lands embraced in the option, and important in identifying the lands contracted to be conveyed, the deed tendered is not a compliance with the terms of the option; and where by such omission a part of the lands agreed upon are excluded from the deed, an acceptance of the deed by the optionee would prevent him from claiming the lands omitted, and hence he is justified in refusing to accept the deed as not being in accordance with the contract of purchase.

4. Deeds and Conveyances—Legal Tender—Currency—Waiver.

While it is necessary to constitute a legal tender for the purchase price of land upon demanding a deed therefor, that it be made according to the acts of Congress, specifying what is legal tender in such transactions, it is required that when the tender is made in money constituting a part of the common currency of the country and ordinarily passing as such, it should be objected to at the time on the ground that it is not legal tender; and in this case, expressions that the currency was not legal tender, and it appearing that the grantor refused to deliver the deed for other reasons, were insufficient on the plea that tender had not been properly made.

APPEAL by defendants from *Bragaw, J.*, at September Special (686) Term, 1912, of BRUNSWICK.

This is an action to compel specific performance of the following option executed by the defendants, which was duly probated and was registered 6 July, 1909:

"Know all men by these presents, that in consideration of the sum of four hundred dollars ($400) paid by George O. Gaylord, of Wilmington, State of North Carolina, to the undersigned parties, the receipt of which is hereby acknowledged, we, Mrs. M. E. McCoy, widow of the late L. C. McCoy, of Brunswick County, State of North Carolina; C. L. McCoy and wife, Lutie McCoy, of Laurinburg, State of North Carolina; Charles F. McCoy, of Cameron, State of South Carolina, and F. M. McCoy and wife, Rosa M. McCoy, of Wilmington, State of North (687) Carolina, do hereby contract and agree with the said George O. Gaylord to sell and convey unto the said George O. Gaylord and his heirs and assigns all that certain tract or parcel of land situate, lying, and being in Northwest Township, Brunswick County, State of North Carolina, adjoining the lands of M. W. Murrell, B. T. Trimmer, Z. E. Murrell, the Metts estate, and lying on both sides of the Carolina Central Railroad, known as the L. C. McCoy place, and the same on which Mrs. M. E. McCoy resides at the present time; the said tract of land containing 1,500 acres, more or less, and lies on the waters of Mill Creek and near the waters of Hood's Creek, and is all of the land owned by Mrs. M. E. McCoy, C. L. McCoy and wife, Charles McCoy and wife, and F. M. McCoy and wife, in the county of Brunswick, State of North Carolina; and that we will execute and deliver to said George O. Galyord and his heirs and assigns, at his or their request, on or before 3 November, 1909, a good and sufficient deed for the said lands, with full covenants and warranty, and free from all encumbrances: *Provided*, and upon condition, nevertheless, that the said George O. Gaylord, his heirs and assigns, pay to the undersigned parties, or their representatives or assigns, the sum of nine thousand dollars ($9,000), less whatever sum has been paid as an option on said land, and such sum or sums as it might be necessary to withhold for the payment of unpaid taxes and outstanding encumbrances on said land. It is understood and agreed that the said sale is to be made at the option of the said George O. Gaylord or his heirs or assigns, to be exercised on or before the said 3 November, 1909.

"And it is further understood and agreed that if the said George O. Gaylord and his heirs and assigns shall not demand of the undersigned parties the deed herein provided for, and tender payment as herein provided for, on or before 3 November, 1909, then this agreement to be

null and void, and the undersigned parties are to be at liberty to dispose of the land to any other person or to use it as the undersigned parties may desire, in the same manner as if this contract had never been made; but, otherwise, this contract to remain in full force and effect.

"And it is furthermore understood and agreed that no timber is to be cut or removed from said land during the continuance of (688) the option.

"The said Mrs. M. E. McCoy, C. L. McCoy and wife, Charles F. McCoy and wife, covenant with the said George O. Gaylord, his heirs and assigns, that they are seized of the above described premises in fee, and have the right to convey the same in fee simple, and that they will warrant said title to be free from defects and that the said title is hereby warranted to be free from defects.

"It is understood that should George O. Gaylord decide to purchase said tract of land, that from the same which is known as the L. C. McCoy graveyard, being near Mill Creek and on the Wilmington and Fayetteville Road, containing one-half acre, more or less, and what is inclosed by an iron fence, is excepted; also is excepted what is known as the Samuel Rowell graveyard, containing one-half acre, more or less, and on the edge of the right of way of the Carolina Central Railroad.

"And to the true and faithful performance of this agreement we do hereby bind ourselves and heirs, executors, administrators, and assigns, to the said George O. Gaylord and his heirs, executors, administrators, and assigns."

On 20 October, 1909, the plaintiff notified the defendants that he had decided to purchase the lands described in said option, and that he demanded a deed in accordance with its terms.

On 29 October, 1909, the defendants, through their attorney, prepared a deed which they tendered to the plaintiff, in which said deed there was omitted the following descriptive words which were in said option: "and is all the land owned by Mrs. M. E. McCoy, C. L. McCoy and wife, Charles F. McCoy and wife, and F. M. McCoy and wife, in the county of Brunswick, State of North Carolina," and at the time of tendering said deed the defendants, through their attorney, wrote a letter to the plaintiff in which they said, among other things, that they tendered the deed in compliance with the terms of the option and demanded the balance due on the purchase price; that they would not settle the creditors' suit brought against the plaintiff, F. M. McCoy, and others, as they did not have to do so in order to give a good title, and that in their opinion the paper-writing did not cover (689) the 60 acres of land spoken of as the Anders place, and that they would not give a deed for the 60 acres that would cover the interest

of F. M. McCoy, nor would they warrant the title to the 60 acres, and that F. M. McCoy would sign no deed covering his interest in the 60 acres.

On 1 November, 1909, the plaintiff replied to said letter of 29 October, stating that the proposition submitted in the letter of 29 October, was not in accordance with the terms of said option, and that the deed tendered did not contain the full description of the land, and making the following demands: "I demand a warranty deed from your clients for the said land above described, free from all encumbrances, as provided in said contract; and the bearer, Mr. Turner, will tender you the purchase price, and you may deliver the deed to him. I am advised by counsel that I am entitled under this contract to a title free from all encumbrances; also that the suit of J. A. Taylor and others is a judgment creditors' bill, which, if the suit is decided adversely to the McCoys, will be a charge or encumbrance upon at least one-third of the land, and is in the nature of a *lis pendens;* and also that there is another suit which may be decided adversely, which must be provided for. You will understand that I am insisting on all judgments, mortgages, and other liens being canceled; but I am entirely willing, if there are any pending suits which amount to a *lis pendens,* to pay the money and take a good bond from your client, protecting me in such suit, in the event they are decided adversely to your client."

Said letter of 1 November, 1909, written by the plaintiff, was handed to the defendant's attorney by the attorney of the plaintiff, and at the same time the attorney of the plaintiff attempted to make a tender of the purchase money, and an account of what occurred at the time is stated by the defendant's attorney as follows: "On 1 November, Mr. Turner brought me certified check for $8,600, and said: 'I want to tender you, and want to know if you make the point that it is not cash?' I told him that F. M. McCoy was the only one who had spoken to me. I presumed I represented all of the defendants, but if the others (690) should say I was not authorized, I couldn't swear that I did represent them, and if, under the circumstances, you want me to waive it, I will do so. He said, 'No, I will get the cash.' I said, 'Very well; comply with the law.' Turner came back about 1 P. M. with a shot-bag in hand, and laid it on my table, with a letter written by George O. Gaylord, addressed to me, as attorney, dated 1 November, 1909, and said he wanted to tender me $8,600, and wanted me to count the money. I read the letter and began counting. The first package contained $500 and was of paper currency, some five-, some ten-, and some twenty-dollar bills. I counted the first package about four-fifths through, and turned to Turner and said: 'Mr. Turner, I want to call

your attention to what you are offering me; here are some National bank notes, silver certificates, some Treasury notes, some gold certificates. I don't have to take this.' I remember one National bank note was for $5 and was signed by J. S. Armstrong, president of the Atlantic National Bank, and called Mr. Turner's attention to this; the amount counted $8,600. I then turned to my stenographer and dicated a letter to George O. Gaylord, dated 1 November, 1909.

"I testified before on the trial of this case. I testified that I told Turner I could not take the money. I said so later in a conversation with you and Judge Whedbee. I stated in that conversation that I did not say to Turner specifically in these terms, 'This is not legal tender,' because I knew if I did he would go to George Rountree, and Rountree would get him to get it up. I did tell him to go out and get the cash. What he (Turner) brought was what is usually called cash, and circulates as money or cash, but it was all bank notes, silver certificates, some Treasury notes, and some gold notes; some of the denomination of five, some ten, some twenty, some fifty, and some one hundred dollars. Most of it was small bills, and it took me about two and one-half hours to count it. The day he brought the money was the same day he brought the check, or said he had the check. I did not go through the form of offering Turner the original deed on its arrival. The McCoys have never repudiated my acts in any way that I know of. C. L. McCoy subsequently same to my office, and we talked it over, and he never repudiated what I did. I wrote the letter of (691) 29 October upon F. M. McCoy's employing me. I am of the opinion that I represented all of the defendants."

The letter dictated and sent to the plaintiff, of date 1 November, 1909, was as follows:

DEAR SIR:—I am in receipt of your letter of 1 November, 1909, addressed to me, relative to the purchase of the McCoy land under the option which you hold, executed some time ago, and, as I understand it, your demand is for a deed in strict conformity with your letter, which you state is a compliance with the terms of the option. I understand from your letter that you will accept no deed unless it is in strict accordance with your letter of 1 November, which I do not regard as in accordance with the option. Your demand therein necessarily has to be declined.

Mr. F. M. McCoy refuses to yield his interest in the 60-acre tract, and refuses to settle the judgments against him personally or the creditors' suit brought by J. A. Taylor and others. All other encumbrances will be removed, and the other parties, other than Mr. F. M. McCoy, are ready to warrant and defend their title to all interest they

have in the property, but they do not feel that it is incumbent upon them, by law or by contract, to settle the judgment against F. M. McCoy, or the creditors' suit, which is really against F. M. McCoy. They feel that the demand in your letter is demanding more than you have a right to, under the option, and you having demanded this, they feel that they are justified in refusing your proposition. Yours truly,

The plaintiff offered in evidence records of the following judgments:

Hicks Company v. C. F. and F. M. McCoy, judgment for $28.26; judgment docketed 23 July, 1909.

J. H. Taylor v. F. M. McCoy, judgment for $194.50, with interest and costs; judgment docketed 23 July, 1909.

N. Jacobi Hardware Company v. F. M. McCoy, judgment for
(692) $44.13, with interest and costs; judgment docketed 1 July, 1909.

J. W. Brooks v. F. M. McCoy, judgment for $174.40, with interest and costs, docketed 16 February, 1909. Sol. Bear & Co. v. F. M. McCoy, judgment for $37.30; judgment docketed 24 October, 1907.

The plaintiff also offered in evidence the record of an action instituted in the Superior Court of Brunswick County on 18 October, 1909, by J. A. Taylor, J. W. Brooks, and others against the plaintiffs and the defendants, which is the creditors' suit referred to in the letter of the plaintiff of 1 November, and in the letter of defendants of 29 October.

The complaint in said action was filed on 26 October, 1909, and in it the land in the said paper-writing is described, and the purpose of the action was to set aside a deed executed by F. M. McCoy to H. H. Edwards, and of a deed executed by H. H. Edwards to C. L. McCoy, and to subject the interest of F. M. McCoy in the purchase price of said lands to the payment of the creditors named in said action, including the judgment creditors before referred to.

Said deed to H. H. Edwards purported to convey in fee all the interest of F. M. McCoy in said lands except his interest in the Anders land of 66 acres, and was registered in Brunswick County on 10 October, 1907; and the deed to C. L. McCoy purported to convey in fee the lands conveyed by the deed of F. M. McCoy, and was registered in Brunswick County, 7 April, 1907.

One of the principal facts in dispute between the plaintiff and the defendants upon the trial of this action was whether the Anders tract, sometimes referred to as 66 acres and at others as 60 acres, was embraced and included in the description in the option sued on.

The jury returned the following verdict:

1. Did the defendants execute the contract, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff tender the purchase money to the defendants, or their authorized agents, in accordance with terms of the contract, before the option expired? Answer. Yes.

3. Did the defendants refuse to accept the tender as made and to execute a deed, according to the terms of the contract? Answer: (693) Yes.

4. Was plaintiff ready, able and willing at all times to pay the purchase price and perform his part of the contract? Answer: Yes.

5. Were the 66 acres, known as the Anders tract, embraced and included in the description contained in the contract? Answer: Yes.

6. Did F. M. McCoy, before or at the time of signing the option contract, inform the plaintiff or his agent that he had no interest in the McCoy lands, other than the 66 acres, or Anders land? Answer: No.

There is no exception to the findings upon the fifth and sixth issues, and as to the other issues, his Honor instructed the jury, if they believed the evidence, to answer the first, second, third, and fourth issues "Yes," and the defendants excepted.

Judgment was entered in favor of the plaintiff, and the defendants excepted and appealed.

Rountree & Carr and W. P. M. Turner for plaintiff.
C. Ed. Taylor and E. K. Bryan for defendants.

ALLEN, J. There are numerous exceptions in the record, which it is unnecessary to consider, as the rights of the parties can be determined upon facts not in dispute.

We have held in *Winders v. Kenan, ante,* 628:

1. That a contract like the one before us is an option, or offer to sell.

2. That being based on a valuable consideration, the makers did not have the right to withdraw the offer before the expiration of the time provided for, which in this case was 3 November, 1909.

3. That in order to constitute an acceptance of the offer in options like this, the optionee must not only indicate that he will accept, but he must also pay or tender the purchase price within the time limited.

Applying these principles, the determination of the appeal depends upon the settlement of two questions: (694)

1. Was there a valid tender of the purchase price according to the terms of the option, prior to 3 November, 1909?

2. If not, did the defendants waive such tender?

We will reverse the order, and will first consider the second question.

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when

it is reasonably certain that the offer will be refused; that payment or performance will not be accepted" (*Hill v. Bank,* 103 U. S., 319) and, "If a party to an executory contract is in a condition to demand performance by being ready and able at the time and place, and the other party refuses to perform his part, an offer is not necessary." *Grandy v. Small,* 48 N. C., 10; *Blalock v. Clark,* 133 N. C., 306; *Hughes v. Knott,* 138 N. C., 112.

The option contract required the defendants, upon payment of the purchase price before 3 November, 1909, to convey all the lands described therein by "a good and sufficient deed with full covenants and warranty, and free from all encumbrances," and the jury has found that the plaintiff was at all times ready, willing, and able to perform the contract on his part, and that the Anders place of 66 acres is "embraced and included in the description contained in the contract."

Three judgments against F. M. McCoy were on the record, which were docketed prior to the registration of the option contract, and were a lien on his interest in the land.

Under these circumstances, the defendants, on 29 October, 1909, five days before the option expired, tendered the plaintiff a deed, which omitted in the description of the land the words in the option, "and is all of the land owned by Mrs. M. E. McCoy, C. L. McCoy and wife, Charles F. McCoy and wife, and F. M. McCoy and wife, in the county of Brunswick, State of North Carolina," and at the same time wrote the plaintiff that, in their opinion, the option did not cover the Anders place; that F. M. McCoy would not execute a deed covering his interest in that place; that they would not pay the judgment against
(695) F. M. McCoy, and that they would not execute a deed covering the interest of F. M. McCoy in the Anders place, nor warrant the title to it.

This was a clear breach of option contract on the part of the defendants, and a refusal to execute it according to its terms, which rendered a tender of the purchase money unnecessary.

The law does not require a vain and useless thing to be done, and what good could have been accomplished by offering to pay money for a deed conforming to the option, when the defendants, after advising with counsel, had declared most positively they would not make it?

It is true, it was held in *Gaylord v. McCoy,* 158 N. C., 325, that the land in the option was that included in the boundaries and under the designation of "the L. C. McCoy place," but it was not held that the words omitted from the deed tendered were not material, and, on the contrary, they were said to be words of description, and therefore important in identifying the lands.

It also appears that the words were left out of the deed because of the contention that the option did not cover the Anders place, and the deed being tendered as a compliance with the option and the defendants having written the plaintiff at the time of the tender of the deed that the Anders place was not included therein, an acceptance of the deed under these circumstances would have prevented the plaintiff from claiming the Anders place.

Nor do we think the letter of the plaintiff to the defendants of 1 November, 1909, changed the status of the parties.

In that letter he demanded a warranty deed free from encumbrances, which was according to the option. He also said that he was advised that the Taylor suit would be a charge or encumbrance on a part of the land, and that it must be provided for. He insisted that all liens on the land be canceled, and proposed that he should pay the purchase money and take from the defendants an idemnity bond as against pending suits.

The plaintiffs and the defendants were parties to the Taylor suit, and one of the purposes of the action was to subject a part (696) of the purchase money to the payment of the creditors. A judgment subjecting the fund would have been binding on all parties, and a payment of the judgment would have discharged the plaintiff from the payment of the purchase price *pro tanto,* and he had the right to be protected against paying twice. If, however, this was not true, after this letter was written and on the same day, two days before the option expired, the defendants renewed their refusal to execute a deed conveying the interest of F. M. McCoy in the Anders place, and to satisfy the judgment against him.

Being, therefore, of opinion that the defendants have waived the tender of the purchase money, it is not necessary to consider the validity of the attempted tender on 1 November, 1909.

The authorities seem, however, to agree that contracts to pay money, unless otherwise provided therein, are solvable in money made a legal tender by acts of Congress, and that bank notes are not within the provisions of these acts, but that as they constitute a part of the common currency of the country and ordinarily pass as money, a tender in such notes is valid unless they are objected to at the time on the ground that they are not legal tender. Ency. U. S. S. C. R., vol. 9, pp. 325-7.

Accepting the statement of counsel for defendants, as we must do as the case is presented, it appears that while he used expressions that might have put the plaintiff's counsel on notice, he states candidly that he did not object to taking the money upon the specific ground that it was not legal tender, and that he refrained from doing so because he knew, if it was made, the legal tender would be procured, and he, at

the time of the tender, wrote a letter to the plaintiff, in which he objected to making a deed on other grounds, and not because legal-tender money was not produced.

For the reasons stated, the judgment is affirmed.

No error.

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2. *Railroads—Easements—Condemnation—Damages—Costs—Appeal and Error.*—In proceedings brought by a railroad company to condemn lands, it was found by the jury on appeal to the Superior Court that defendant's benefit therefrom exceeded his damages, the assessors having found they were equal. *Held*, the costs were taxable against the plaintiff accruing up to the time of appeal from the clerk, and against the defendants appealing from the Superior to the Supreme Court, the judgment of the Superior Court being affirmed. *R. R. v. Gahagan*, 190.

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29. *Motions—New Trial—Newly Discovered Evidence—Supreme Court—Appeal and Error.*—In order for a party litigant to avail himself of newly discovered evidence in the Supreme Court, the case must be brought to that Court on appeal. *Stilley v. Planing Mills*, 517.

30. *Same—Practice.*—As to whether a defendant may avail himself of plaintiff's appeal to move the Supreme Court for a new trial on newly discovered evidence, *Quœre;* but in this case the Court has examined the evidence relied on by the defendant, and refused the motion made thereon, and, following the practice of the Court in such instances, without discussion. *Ibid.*

31. *Appeal and Error—Maps—Evidence Excluded—Materiality.*—Where a map of the lands in controversy has not been sent up with the record, its exclusion by the court below will not be held for error, for the appellate court cannot see its relevancy; but in any event its exclusion in this case was proper if it was because the surveyor had marked his conclusion instead of following the direction of the court in making it. *Fulford v. Fulford*, 601.

32. *Appeal and Error—Removal of Causes.*—An appeal lies from an order denying a motion for the removal of a cause to the proper county for trial. *Cedar Works v. Lumber Co.*, 603.

33. *Verdict, Directing—Evidence, How Considered—Defendant's Rights—Contradictory Evidence—Negligence—Evidence—Appeal and Error.*—Where the trial judge directs the jury to find for the plaintiff if they believe the evidence, the whole evidence should be considered in the light most favorable to the defendant; and though it may appear from the examination, in part, of defendant's own witnesses, that the instruction may have been correct, it will be held for error if taking the evidence as a whole there was sufficient to constitute the defense relied on by him. *Brown v. R. R.*, 575.

ATTACHMENT. See Principal and Surety, 1, 3.

Attachment—Custodia Legis—Property Subject to Levy.—The principle that property in *custodia legis* is not subject to a levy under an attachment does not prevail where the interest of an individual or litigant has been finally ascertained or declared to be his, and there is no writ or mandate or judgment of the court, in the claim and delivery proceedings, which requires its further retention. *Bank v. Johnston*, 506.

BANKRUPTCY. See Insurance.

BASTARDS.

1. *Bastardy—Civil Action—Purpose.*—Bastardy is a civil proceeding for the enforcement of a police regulation as far as it is necessary for the purpose of securing an allowance to the woman, and to relieve the county from the necessity of supporting the child. *S. v. Currie*, 275.

2. *Bastardy—Denial Under Oath—Justice's Court—Proceedings—Presumptions—Appeal and Error.*—In bastardy proceedings it is necessary for the defendant to deny under oath the paternity of the child (Revisal, sec. 254), though not necessarily in writing, and

BASTARDS—*Continued.*

when it appears that the case had been tried before the justice as if the denial had been made and verdict rendered for the defendant, it will be assumed in the Superior Court on appeal that the trial proceeded regularly, and the justice failed to make the required entry. *Ibid.*

3. *Bastardy—Denial Under Oath—Justice's Court—Appeal—Incomplete Return—Docket—Practice.*—In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his docket and in his return; and if the docket is incomplete in this respect the Superior Court judge on appeal should allow the denial to be entered *nunc pro tunc. Ibid.*

4. *Same—Motions—Interpretation of Statutes—Substantial Compliance.*—In the Superior Court on appeal in bastardy proceedings it is not necessary that the return of the justice, before whom the case was originally tried, technically comply with the direction of the statute; and if a more perfect return is desired, and is substantially sufficient for the court to act upon, the court has statutory power to have one sent up. Revisal, secs. 1467, 1494. *Ibid.*

BILLS AND NOTES. See Usury; Intoxicants, 2.

1. *Bills and Notes—Agreement—Novation—Deeds and Conveyances—Escrow—Continuing Liability.*—The plaintiff and defendant entered into a contract to support their mother in consideration of her deed to certain timber interests on her lands and a conveyance of part of the realty, and the defendant gave plaintiff a note for money the latter had advanced in order to enable him to meet his obligations thereunder. Thereafter the other children and heirs at law objected to this arrangement and threatened suit to set aside the deed, but, instead, agreed with the plaintiff and defendant that their deed should be set aside, and that each was to repay the moneys advanced, in certain portions. To that end and until each of the children should have paid his part, a deed in escrow was delivered which created a charge upon the lands held by each for the support of the mother. The plaintiff retained the defendant's note under the agreement that a certain one of the children, a married woman, should pay thereon the sum she had obligated to pay under the arrangement, and demand was made on her and the defendant therefor before the institution of this action to recover the amount: *Held*, the agreement between the children was not a novation of the note, and plaintiff was entitled to recover thereon, as the defendant continued liable, as the payment to be made by the other child under the agreement was to have been accepted as a credit on the note. *Ponder v. Green*, 50.

2. *Negotiable Instruments — Indorsers—Due Course — Instructions.*—Where the defense to an action on a negotiable note involved the question as to whether it was indorsed to the plaintiff in due course, it is error for the trial judge to omit from his charge as to what constituted due course, that the indorsee received it in good faith, for value, and that "at the time it was negotiated he had no notice of any infirmity in the instrument or any defect in the title of the

BILLS AND NOTES—*Continued.*

person negotiating it"; but in this case the error was rendered harmless when construed with the other parts of the charge, wherein the burden was placed on the plaintiff to show that he had no knowledge of the infirmity of the note or of any defect in the title of the person negotiating it. *Hardy v. Mitchell*, 351.

3. *Instructions—Statements of Fact—Objections and Exceptions—Appeal and Error.*—In an action upon a note, a charge to the jury that the amount paid for the note was not controverted, was merely a statement as to a fact, and not a conclusion of law, and if an erroneous statement, it was the duty of objecting counsel to have called it to the attention of the judge in time for him to correct it and clear up the misunderstanding, and comes too late when excepted to after the trial. *Ibid.*

4. *Notes — Fraud — Misrepresentation—Other Acts—Evidence.*—Where payment upon a note is resisted for fraud in its execution, evidence is incompetent which seeks to show that fraud had been practiced by the plaintiff in procuring similar notes from others who are not parties to the action. *Vaughan v. Exum*, 492.

5. *Notes—Fraud.*—The burden is on defendants to show the fraud in the execution of a note which they allege as a defense in plaintiff's action to recover thereon, and a motion to nonsuit upon the evidence cannot be sustained. *Ibid.*

BONDS. See Ejectment.

BOND ISSUE. See Drainage Districts; Municipal Corporations, 15.

CANCELLATION. See Reformation, Rescission, and Cancellation; Insurance.

"CAR-LOAD." See Vendor and Purchaser, 8.

CARRIERS.

1. *Carriers of Passengers—Tickets—Receipts—Presumptions—Evidence.*—A railroad ticket is in the nature of a receipt to the pasesnger for his railroad fare to his destination, and is evidence to the proper agents of the company that the bearer is entitled to be carried by the company issuing it. *Norman v. R. R.*, 330.

2. *Same—Contracts—Consideration.*—Where a passenger of a railroad company purchases from its ticket agent at its station the usual ticket to his destination, the itcket is *prima facie* evidence that the holder has paid the consideration or the regular price for it, which entitled him to be accordingly transported by the company. *Ibid.*

3. *Carriers of Passengers—Tickets—Stipulations—Notice—Consent—Contracts—Consideration.*—The purchaser of a ticket of a railroad company by paying the usual charges therefor in the usual way is entitled to have a valid ticket given him by the company's agent, and, in the absence of evidence of his assent prior to or at the time of the purchase, he is not bound by a stipulation on the ticket rendering it invalid, for such provision would be without consideration. *Ibid.*

4. *Same—Station Stamp—Unreasonable Rules.*—A ticket of a railroad company, reading "Station stamped on back to station opposite point

CARRIERS—*Continued.*

in margin below; good for one passage," etc., does not notify the purchaser or indicate to him that he is entering into a contract that would invalidate the ticket if the station where he purchased it was not stamped on the back thereof; and such requirement not appearing upon the face of the ticket, or brought to the purchaser's notice, or assented to by him, is unreasonable, and will not bind him. *Ibid*

5. *Same—Principal and Agent—Negligence—Respondeat Superior.*—Where the ticket agent of a railroad company has failed to stamp his station on the back of a ticket furnished by him to a passenger at the regular price therefor, and the conductor wrongfully ejects the passenger from the train under a rule of the company requiring it, under the circumstances, the company is liable to the passenger for the injury thereby caused, arising from the negligence of its station agent, while the conductor may be exonerated from personal blame. *Ibid.*

6. *Carriers of Passengers—Wrongful Ejection of Passenger—Avoidance of Damages—Cash Fare—Instructions—Evidence.*—The plaintiff sues for damages sustained by him for being wrongfully ejected from defendant railroad company's passenger train by the conductor, who refused to recognize the validtiy of a ticket for transporting the plaintiff to his destination. The defendant contended that the plaintiff, after he had been ejected, should have avoided the damages incurred by paying in cash the railroad fare to his desination, and tendered a prayer for special instruction to that effect: *Held*, the prayer was properly refused, for it assumed that the plaintiff had the money to pay the cash fare, of which there was no evidence. *Ibid.*

7. *Carriers of Passengers—Ejection of Passenger—Right to Pay Cash Fare — Rights of Conductor—Waiver — Evidence—Instructions.*—When the conductor in a railroad company's passenger train erroneously assumes that a ticket, good for a passenger's transportation, is invalid, and ejects him from the train, a prayer for instruction which asumes that the conductor would then have accepted a cash fare, and that the plaintiff should have paid so as to have avoided the damages caused by the ejection, is properly refused; for the conductor from his point of view was under no legal obligation to accept the fare after the passenger's expulsion, the latter having at that time forfeited his right by his misconduct, and there being no evidence that the conductor would have waived his right to refuse had the cash fare been tendered him. *Ibid.*

8. *Carriers of Passengers — Tickets — Stipulations Limiting Liability — Intrastate Tickets—Void Stipulations.*—Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are held in this State to be void as an attempt on the part of the carrier to contract against its own negligence; and such stipulations are not enforcible on intrastate tickets or bills of lading. *Cooper v. R. R.*, 400.

CARRIERS—*Continued.*

9. *Same—Interstate Tickets—Decisions of the United States Supreme Court.*—The decisions of the Supreme Court of the United States are controlling as to the validity of stipulations on tickets of common carriers limiting their liability for baggage, and similar provisions on their bills of lading or receipts for the transportation of freight or express, only where the tickets and bills of lading are interstate. *Ibid.*

10. *Carriers of Passengers—Street Railways—Passenger's Opportunity to Procure Tickets—Ejection from Car—Damages.*—While a carrier of passengers is liable in damages to a passenger for ejecting him from its cars for failure to have a ticket, when they have not afforded him a reasonable opportunity to procure one, the principle does not apply where a street car company, charging a 5-cent cash fare, sells six tickets for 25 cents, and the passenger, having had ample opportunity to buy them, goes to the seashore terminal, where, owing to the season of the year, tickets are not sold, of which he previously knew; and returning, offers to buy tickets from the conductor at a place on the line where he knows the conductors did not sell them, and, refusing to pay the cash fare, is ejected from the car. *Herbst v. Power Co.*, 457.

11. *Carriers of Passengers—Regulations—Operation of Trains—Depot Buildings—Safe Ingress.*—A railroad company may make reasonable regulations as to the running of its trains, and may determine the part of the train to be nearest the station at stops, having due regard for the convenience of the traveling public, and providing safe walkways from the place of egress to the station. *Anderson v. R. R.*, 462.

12. *Carriers of Passengers—Feeble Passengers—Knowledge of Carrier—Depot Buildings—Negligence—Compensatory Damages.*—Where a railroad company has been made aware of the feeble condition of a female passenger who had just left a sanatorium to take a long journey by rail to her home, and has been notified that the passenger should be taken good care of, and the train, nearly two hours late, reached its destination at 2:15 o'clock at night in inclement weather, and the employee on the train put the passenger off on the side of the train opposite the depot building, so that the passenger insisted she was at the wrong station, when the employee assisted her to disembark on the other side of the train, and left her exposed where there were no provisions made for passengers, 185 yards from the passenger shed, where her son, who had gone to meet her, afterwards found her weak, cold, and shivering, it is *Held*, some evidence of substantial damages to be submitted to the jury. *Ibid.*

13. *Carriers of Goods—Bills of Lading—Indorsements of Shortage—Burden of Proof.*—In an action against the carrier to recover for a shortage of one box in the delivery of a shipment of two boxes of merchandise the plaintiff introduced in evidence the carrier's bill of lading, showing the delivery of the two boxes to the carrier, whereon the agent at destination had marked "one case short": *Held*, the agent's indorsement of the shortage was within the scope of his agency, and it was for the defendant to show, by the preponderance of the evidence, that the indorsement on the bill of lad-

CARRIERS—*Continued.*

ing was a mistake and that the case of goods marked short was actually delivered, when that defense is relied on. *Dunie v. R. R.*, 520.

14. *Same—Prima Facie Case—Charge Construed as a Whole—Harmless Error.*—In this action to recover of the carrier a case of merchandise, marked "short" on the bill of lading, the defendant contended that this indorsement was intended for another bill of lading and unintentionally made on the one covering the shipment in suit, which it had actually delivered to the plaintiff. The court charged the jury that this entry was an admission, *prima facie*, that one case was missing, which placed the burden on the defendant to show the contrary: *Held, the words* "prima facie" were inaptly used, but, taken in connection with the other relevant part of the charge, no reversible error is found. *Ibid.*

15. *Carriers of Passengers—Negligence—Duty of Conductor—Assault on Passenger—Anticipation of Assault—Protection of Passengers.*—A conductor on a railroad passenger train is held to a high degree of care in looking after and protecting passengers on his train, and he is clothed to some extent with the powers of a peace officer; and if he fails to act in certain instances it may be imputed to the company's wrong; and it is held that, by reason of these exigent duties and of his right to protect himself in emergencies, a right present in negligence as well as in other cases, he is not always required to await developments or remain inactive until there is some overt act by a passenger importing a present physical menace either to himself or the other passengers; but in view of all the facts known or as they may reasonably appear to him, he may at times interfere to prevent or forestall violence. *Brown v. R. R.*, 573.

16. *Same—Damages—Justification of Conductor—Evidence.*—In an action to recover damages of a railroad company for an assault upon the plaintiff, a passenger, as he was leaving the train, there was evidence tending to show, and *per contra*, that the plaintiff's conduct on the train was improper; that he did not give his ticket to the conductor, who required him to pay his cash fare, whereupon the plaintiff threatened the conductor when he reached his destination; that passengers warned the conductor to look out for the plaintiff at his destination, that he was armed with a pistol; and that the conductor had other employees of the road present at the steps of the car at the station where passengers were alighting; that as plaintiff was getting off the train, with a bundle under his arm, he was seized by the other employees and searched by the conductor for a weapon, which he failed to find; that the manner of the search made by the conductor was by passing his hands over the plaintiff's clothes, gently slapping the pockets; that after the plaintiff was released he assaulted the conductor, resulting in being knocked down by him, and for which assault the plaintiff seeks to recover the damages alleged: it is *Held*, that an instruction that the jury find for the plaintiff if they believe the evidence is erroneous, for it was a question for the jury to determine, in view of the facts as they reasonably appeared to the conductor, whether he was justified in seizing and searching the plaintiff as he was alighting from the train. *Ibid.*

CITIES AND TOWNS. See Municipal Corporations; Reformation, Rescission, and Cancellation.

COLLATERAL ATTACKS. See Judgments.

COMMERCE. See Intoxicating liquors.

COMMINGLING OF GOODS. See Pledges.

CONSIDERATION, ILLEGAL. See Contracts.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 11. It is not objectionable to have the prisoner place himself in a position which under the evidence would show he could have committed the murder. *S. v. Thompson*, 238.

V, sec. 3. An act imposing a special tax on lumber dealers for road purposes, and a fine for not obtaining license, is constitutional. *S. v. Bullock*, 223.

V, sec. 5. Rents and profits of charitable, etc., institutions are not exempt from taxation. *Davis v. Salisbury*, 56.

X, sec. 6. Husband's estate as tenant by the curtesy initiate is abolished. *Sipe v. Herman*, 107.

CONSTRUCTIVE POSSESSION. See Deeds and Conveyances, 12, 13.

CONSTITUTIONAL LAW. See Taxation; Municipal Corporations; Intoxicating Liquors.

1. *Legal Proceedings—Presumptions—Sales—Deeds and Conveyances—Homestead—Excess—Debts Contracted Prior to 1868—Constitutional Law.*—The presumption is in favor of the validity of judicial proceedings, and where a tract of land has been sold under a judgment on a debt contracted prior to the Constitution of 1868, and the homestead has since been laid off in a part thereof, in the absence of evidence to the contrary it will be presumed that the excess was first sold, and the proceeds being insufficient to pay the debt, the homestead was then sold, and the deed of the sheriff conveying the entire tract will be held valid. *Corey v. Fowle*, 187.

2. *Roads and Highways—Hauling Timber—License Tax—Uniformity—Constitutional Law.*—An act which makes it a misdemeanor, punishable by a fine not exceeding $50, for any person or corporation to carry on the business of hauling logs, timber, or lumber over road districts laid out and created in a certain county without having obtained a license therefor, to be issued by the road commissioners in a prescribed manner, grading the license with reference to the number of horses driven to the wagon used, the money collected to be paid over to the treasurer of the county by the road commissioners, and held to the credit of the district collecting it, is uniform in its application, and not discriminative, and is not repugnant to the State Constitution, Art. V, sec. 3; Art. I, sec. 7; Art. I, sec. 17; and to the fourteenth amendment to the Constitution of the United States. *S. v. Holloman*, 139 N. C., 642; *Dalton v. Brown*, 159 N. C., 175, cited and applied. *S. v. Bullock*, 223.

CONSTITUTIONAL LAW—*Continued.*

3. *Murder—Evidence—Duress—Self-incrimination — Constitutional Law.* —Upon trial for murder in the first degree, when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place his foot in footprints leading from the place of the murder to his own dwelling, or to place himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, the position of the deceased and point from which the fatal shot was fired being in evidence, and is not objectionable under Article I, sec. 11, of the Constitution, which declares that every man has a right "not to be compelled to give evidence against himself." *S. v. Thompson*, 238.

4. *Cities and Towns—Police Powers—Taxation—Restaurants—Statutes—Ordinances—Constitutional Law.*—A legislative charter granted to an incorporated town authority to tax restaurants, etc., to define and abate nuisances, etc., and an ordinance passed in pursuance thereof, applying to all alike, requiring that keepers of restaurants, etc., should be licensed, and that persons desiring to engage in such business shall, before doing so, apply to the board of commissioners of the city, stating the place, etc., and pay for the privilege the sum of $25, are constitutional and valid, whether the regulations are regarded as within the police powers of the town or within its taxing power. *S. v. Snipes*, 242.

CONTRACTS.

1. *Divorce — Notes—Contracts—Illegal Consideration—Remedies.*—Notes given by the husband in consideration of the procurement by the wife of a divorce *a vinculo* is against public policy and not enforcible, as the law will not afford a remedy to compel either of the parties to perform its obligation. *Pierce v. Cobb*, 300.

2. *Divorce—Notes—Contracts, Written—Illegal Consideration — Parol Evidence.*—A note containing an indorsement that it was given in consideration of the wife of the maker obtaining a divorce *a vinculo* from him in six months, otherwise not collectible, and that payee agrees thereto, appears upon its face to arise *ex turpi causa*, and it may not be shown, in a suit by the payee thereon to purge the instrument of its illegality, that its consideration was not correctly stated in the writing, but in fact was for the payment of alimony, the parol evidence proposed being contradictory of the written instrument in that respect. *Ibid.*

3. *Contracts, Written—Parol Evidence—Contradiction.*—When the parties to a written contract have therein expressed their meaning in plain terms, it may not be contradicted or altered by parol testimony; but when the contract is partly in writing, the oral stipulations can be made avilable when they do not contradict the written part. *Manufacturing Co. v. Manufacturing Co.*, 430.

4. *Same—Vendor and Vendee—Method of Payment.*—When in a contract of sale it is stated that the purchase price is to be paid by the vendee in money, or so many dollars, without further written specification, parol evidence may be received tending to establish, as a part of the contract, a contemporaneous agreement that a different method of payment should be accepted. *Ibid.*

CONTRACTS—*Continued.*

5. *Same—Terms of Payment.*—Where in a written contract of sale it is stipulated that the vendee pay for the article sold a certain sum of money, "terms net cash thirty days after installation," the specified terms of payment have reference only to the time and amount of payment and the passing of the title, and do not and were not intended to specify or control the method of such payment. *Woodson v. Beck*, 151 N. C., 144, cited and distinguished. *Ibid.*

6. *Same—Agreement of Exchange—Consideration.*—The defendant being sued for the purchase price of a certain machine, or trap, sold under a written contract specifying the price to be in a certain sum, "terms net cash thirty days after installation": *Held*, as a method of payment presented by the pleadings, it was competent for the defendant to show by parol that the trap was inadequate for the purposes intended, and that the parties agreed as a part of the contract that the trap should be paid for by the vendor's taking it back, furnishing a sufficient and larger trap, for which the vendee was to make an additional payment and return the trap which had been furnished. *Ibid.*

7. *Contracts—Assignments—Signing as Obligor—Intent—Interpretation.*—One signing a unilateral written contract relating to personalty, at the place usual for obligors thereon, will as a general rule be bound by its terms, though his name does not appear in the body of the instrument, the test being whether from a perusal of the entire instrument, without the aid of extrinsic evidence, his intent to execute and to be bound by it plainly appears. *Carson v. Insurance Co.*, 441.

8. *Same—Bilateral—Independent Stipulations.*—The principle which obtains to bind one who has signed a written instrument as an obligor thereon, though his name may not appear in the body of the instrument, is, to a great extent, but not universally, confined to contracts relating to personalty which create a present obligation, and are, one their face, unilateral in operation, and not where the written instrument contains mutual or interdependent stipulations by reason of which, without the aid of extrinsic evidence, it cannot be determined whether a third person who joins in subscribing to the paper intended to come under obligation to one or the other of the subscribing parties. *Ibid.*

9. *Contracts—Interpretation—Assignments—Signing as Obligor—Realty Married Women.*—The general rule which binds one appearing upon a unilateral written instrument appearing to have signed it as an obligor thereon, does not obtain in instruments conveying or assigning rights and interests in realty, more particularly when rights of married women are claimed or assailed under deeds purporting to have been made by a husband in which his wife's name only appears with his as subscriber to the instrument. *Ibid.*

10. *Contracts—Partly Written—Assignments—Parol Evidence—Collateral—Burden of Proof—Degree of Proof—Preponderance of the Evidence.*—In written assignments of ordinary mercantile or business contracts it is competent for the parties to prove by parol, and as a part of the agreement, but not reduced to writing, that the instrument should be held as collateral to secure a debt; and where a pol-

CONTRACTS—*Continued.*

icy of life insurance has been assigned in writing it is only necessary to show, by the preponderance of the evidence, and not by clear, strong, and convincing testimony, that as a part of the agreement, resting in parol, the policy was not to be held as an absolute assignment, but only as collateral security for moneys advanced by the assignee thereon. In this case a statement appearing at the top of the written contract of assignment, describing it as "an absolute assignment, etc.," does not affect the principles applied. *Ibid.*

11. *Written Contracts—False Warranty—Fraud—Parol Evidence.*—The defense of false warranty in a written contract of sale requires that the party relying thereon, being bound by the terms of the warranty, must have complied with them in order to recover; but this principle does not obtain where the contract itself is attacked for fraud in the procurement, for if the fraud is established, the contract is void, and hence parol evidence is admissible to establish the fraud, and is not restricted by the written words of the contract, under the principle that they may not be varied by parol. *Machine Co. v. McKay*, 584.

12. *Written Contract—Fraud—Parol Evidence—Burden of Proof.*—Where the purchaser of goods seeks to avoid a contract of sale made by the agent of the seller, for fraud of the agent in procuring the contract, he must show (1) that the representations relied on were made by the agent, (2) that the agent knew they were untrue, and made them with intent to deceive; (3) and that he acted in reliance thereon in making the purchase. *Ibid.*

13. *Same—Principal and Agent—Evidence, Sufficient.*—Upon the question of fraud in procuring the sale of a traction engine by plaintiff's agent from the defendant, there was evidence in behalf of the defendant tending to show that the agent represented that the engine would haul a certain amount of lumber a day; that it would decrease the cost of defendant in hauling his lumber; that the engine was constantly breaking down and would not haul the quantity of lumber as represented by the agent that it would; that the agent knew that his representations were false, as evidence by his saying the engine was worn out before it was delivered; and it is *Held*, that the evidence was sufficient to be submitted to the jury upon the question of plaintiff's fraud, which, if the jury found to be true, would vitiate the written contract of sale. *Ibid.*

14. *Same—Acceptance—Plea in Bar.*—Where a contract for the sale of a traction engine has been procured by fraudulent representations which vitiate the contract of sale, and it appears that the purchaser, before he has had opportunity to test the engine, was induced by the agent of the seller to accept it and make a payment thereon, under the assurance that the contract would not bind him if the engine was not as represented, the acceptance, under such conditions, does not bar the purchaser of his defense in an action by the seller to recover the contract price. *Ibid.*

15. *Same—Fraud and Mistake—"Satisfaction Slip."*—Where the purchaser of a traction engine has established fraud in the procurement of the contract of sale sufficient to vitiate the contract, and has been induced to accept the engine, make a payment on the purchase price

CONTRACTS—*Continued.*

and give his notes for the balance thereof upon the false assurance of the seller's agents that it would accomplish certain purposes for which it was bought, and there is evidence that the purchaser signed what is called a "satisfaction slip" at the time he signed the notes, reasonably mistaking it for one of the notes, and in an action to recover upon the notes this "satisfaction slip" is relied on as a bar to the defense of fraud, and there is further evidence that the purchaser, as soon as he reasonably could find out that the engine was not as represented, notified the seller thereof and held the engine subject to his disposition, it is *Held*, that it was for the jury to decide whether or not the defendant signed the "satisfaction slip" under a mistake, and if he did it would not bar his right of recission upon the ground of fraud in the purchase; and *Held further*, that the "satisfaction slip" relied on in this case only amounted to an expression that the defendant was pleased with his purchase before he reasonably could have discovered its worthless character. *Ibid.*

16. *Contracts, Unilateral—Deeds and Conveyances—Options—Acceptance.*—Where in consideration of a certain sum of money the owner of lands agrees to convey them within a named period upon the payment of an agreed purchase price, the writing is unilateral, an offer to give another the right to buy, an option, and not a contract to sell, which does not bind the one accepting its conditions to purchase the land, and he is required to exercise his rights thereunder within the specified time, and perform the condition imposed as to payment, in accordance with the terms of the writing. *Winders v. Kenan*, 628.

17. *Same—Consideration—Rights of Parties.*—Where a unilateral contract or option for the sale of lands is not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance; but if there is a valuable consideration to support it, the right continues during the period fixed in the option. *Ibid.*

18. *Same—Conditions Precedent—Tender.*—Where an option for the sale of lands has been accepted, which provides for the payment of the purchase price as a condition precedent, it is the duty of the purchaser to pay in accordance with its terms, and a mere notice of his intention to buy is insufficient. *Ibid.*

19. *Same—Time of the Essence.*—Unilateral contracts or options for the sale of lands are to be construed more strictly in favor of the maker, and the time of its performance by the one holding the option is of the essence of the contract, and the conditions imposed must be performed by him in order to convert the right to buy into a contract of sale. *Ibid.*

20. *Contracts, Unilateral—Consideration—Purchase Price—Interpretation of Contracts—Conditions Precedent.*—A written contract for the conveyance of land which expresses the consideration of $500 paid to the maker, and that upon the payment of a certain sum he will make the deed thereto, is construed to mean that the $500 was paid for the right to buy, and that this right cannot be exercised until payment or tender of the purchase is made. *Ibid.*

CONTRACTS—*Continued.*

21.—*Same—Waiver—Acceptance—Tender.*—Where as a condition precedent to the delivery of the deed an option on land provides for the payment of the purchase money by a certain time, and this payment is delayed by reason of the maker not being prepared with his deed, and thereafter the proposed purchaser is notified of the maker's readiness, the previous waiver of the time of payment by the maker does not excuse the purchaser from making a prompt tender of the purchase money, in accordance with the terms of the option; and his mere notice that he will exercise the right is ineffectual to secure it. *Ibid.*

22. *Contracts, Unilateral—Conditions Precedent—Tender—Failure of Performance—Deeds and Conveyances—Alterations.*—Where the payment of the purchase price is made a condition precedent to the right to exercise an option for the purchase of lands, and the proposed purchaser has failed to tender the purchase price in accordance with his contract, any alterations in the deed by the maker thereafter becomes immaterial, the purchaser having lost the right to demand the deed his option had called for. *Ibid.*

23. *Same—Evidence.*—In an action to recover a tract of land it is competent for the plaintiff to show, as to whether the defendant entered the possession of the lands under an agreement with him and in subordination to his title, that when he moved his residence therefrom and to another county the defendant or his agent promised to take charge of the land and look after it in his absence, and to pay taxes, which he was to repay on being notified; that defendant agreed to list the taxes in the plaintiff's name; that defendant was to receive the rents to be applied on an account due him by plaintiff; that some three years ago defendant asked plaintiff to sell him the land. *Ibid.*

24. *Deeds and Conveyances—Contracts to Convey Lands—Options—Consideration—Compliance.*—An option for the sale of lands based upon a valuable consideration is an offer to sell which may not be withdrawn by the grantor before the expiration of the time provided in the option; and in order to constitute an acceptance, the optionee must not only indicate that he will accept, but he must also pay or tender the purchase price within the time limited, the option imposing this condition. *Winders v. Kenan*, 161 N. C., 628, cited and applied. *Gaylord v. McCoy*, 685.

25. *Same—Tender of Payment—Waiver.*—Where the grantor of an option on lands given for a valuable consideration has refused to make a warranty deed according to the terms thereof, and by refusing to include certain lands embraced by his contract or pay off encumbrances he had agreed to pay, or to give bond for their payment as proposed by the optionee, a tender by the optionee of the purchase price within the period of time specified for the running of the option is unnecessary, and the refusal of the grantor to comply with the terms of the contract, in this manner, which he was obliged to perform, is a waiver of a legal tender of the purchase price; and the optionee, who has ever continued ready, able, and willing to pay, may enforce the contract according to its terms in his action thereon, and secure a proper deed upon the payment of the price agreed. *Ibid.*

CONTRACTS—*Continued.*

26. *Deeds and Conveyances—Contracts—Options—Tender of Deed—Description—Requisites.*—Where under an option to purchase land given for a valuable consideration the grantor tenders a deed which omits a part of the description of the lands embraced in the option, and important in identifying the lands contracted to be conveyed, the deed tendered is not a compliance with the terms of the option; and where by such omission a part of the lands agreed upon are excluded from the deed, an aceptance of the deed by the optionee would prevent him from claiming the lands omitted, and hence he is justified in refusing to accept the deed as not being in accordance with the contract of purchase. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Master and Servant, Negligence.

CORPORATIONS.

1. *Principal and Agent—Trusts and Trustees—Corporations—Officers—Lawful Acts—Presumptions.*—An ordinary contract made by the president of a corporation with respect to the corporate property is presumed to be lawful. *Fountain v. Lumber Co.*, 35.

2. *Same—Contracts.*—Where one, as in this instance, the president of a corporation, contracts with reference to property which he holds as agent or in trust, and signs the contratc individually, but is in fact therein acting as agent, he binds the principal to the transaction. *Ibid.*

3. *Principal and Agent—One-man Corporation—Fraudulent Devices—Evidence—Questions for Jury.*—J. owned practicaly all of the stock in two corporations, the W. Co. and the J. Co., and with them, and by himself individually, was conducting a lumber business from the same office. He contracted with the plaintiff to move his sawmill on certain lands and cut the timber therefrom, and fell into arrears of payment, whereupon the plaintiff filed a lien against J. and the J. Co., but finding the timber rights were in fact owned by the W. Co., immediately filed a lien against them and brought this action. J. and Co. went into bankruptcy and the W. Co. set up the defense that the W. Co. had sold the right to cut the timber to the J. Co. and that J. had made the contract in its behalf or in behalf of himself: *Held*, evidence was sufficient to be submitted to the jury as to whether J., in making the contract, was acting *bona fide* in behalf of himself or the J. Co., or whether the separate corporations were used as a device to avoid responsibility on the part of the W. Co. *Ibid.*

4. *Corporations, Foreign—Process—Service of Summons—Director—Interpretation of Statutes.*—Service of summons, in an action brought by a citizen and resident of this State, against a foreign corporation, which has no property and does not conduct its business here, is valid if made on its director, who is a citizen and resident of this State, under the provisions of Revisal, sec. 440 (1), the restrictions as to doing business and owning property here, etc., not applying to officers of this character. *Menefee v. Cotton Mills*, 164.

5. *Notes—Pledges—Collaterals—Corporations—Receivers—Distribution of Assets—Unsecured Creditors.*—Collateral deposited with a note given a bank by a corporation subsequently becoming insolvent and in a

CORPORATIONS—*Continued.*

receiver's hands may be held by the bank until the note is paid, or sold by the bank, and the proceeds, if more than sufficient, should be paid over to the receiver; and the bank is then entitled to prorate with the other unsecured creditors of the corporation. *Milling Co. v. Stevenson*, 510.

CORPORATION COMMISSION.

1. *Railroad Commission—Union Depots—Appeal—Superior Court—Trial de Novo—Evidence—Practice.*—On appeal from an order of the Corporation Commission requiring two railroads operating in the same town to have a joint or union depot there for passengers, the trial is *de novo* by express provision of the statute and tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence may be there introduced, whether it had theretofore been introduced before the Commission or not. *S. v. R. R.*, 270.

2. *Railroads—Corporation Commission—Union Depots—Requisites of Order—Effect on Other Towns—Evidence—Appeal and Error.*—Revisal, sec. 1097, empowers the Corporation Commission to direct two railroads operating in the same town to have a joint or union depot, for their passengers, when practicable, or the necessities of the case require it for the security, accommodation, and convenience of the traveling public; and in this case, wherein a union passenger depot had been ordered by the Commission at Rutherfordton, it was *Held*, reversible error in the Superior Court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values at Hamptonville, a near-by town, where the present station of one of the roads is located. *Ibid.*

COSTS. See Appeal and Error; Insurance, 28; Trials, 78, 79.

COURTS. See Taxation; Trials; Venue; Justice of the Peace; Attachment; Trespass; Reformation, Rescission and Cancellation.

1. *Clerks of Court—Probate—Appeal—Superior Court—Jurisdiction.*—Clerks of the court exercising probate powers are not regarded under our Constitution and statutes as tribunals or officers exercising a separate and independent jurisdiction to that of the Superior Courts, and their judgments and rulings on appeal are very generally subject to the supervision and control of the court. *Mills v. McDaniel*, 112.

2. *Same—Issues of Fact and Law—Procedure.*—The rulings or decisions of the clerks of the court must be "transferred for trial to the next succeeding term of the Superior Court (Revisal, secs. 78, 114, 529, 717) if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Ibid.*

COURTS—*Continued.*

3. *Same.*—Upon appeal to the Superior Court from the rulings or decisions of the clerks of the court in matters of probate, very large latitude is allowed in the method of procedure and the extent of the relief which may be afforded by the appellate court, with a view of promoting right decisions. *Ibid.*

4. *Same—Evidence.*—An appeal may be taken from the adverse ruling or decision of the clerk of the court in proceedings to establish and declare a proper probate and privy examination to a deed by a *feme covert*, upon the ground that it had been duly taken, but the printed and written form had become detached from the deed in some way and lost or destroyed; and in this case it is *Held* sufficient evidence for the judge to reverse the ruling or decision of the clerk and to sustain the probate, the evidence consisting of entries and *indicia* on the face of the deed, and testimony of the clerk himself, together with that of another witness. *Ibid.*

6. *Pilots—Commissioners of Navigation—Discretion—Scope of Powers—Court's Jurisdiction.*—*Semble*, that under our statute, Revisal, sec. 4976, it is within the discretion of the commissioners of navigation and pilotage as to whether they will revoke the license of a pilot who has violated their rules by using an unchartered and unnumbered boat; and the courts are without original jurisdiction to determine whether the rules of the commissioners have been violated in this regard. *Davis v. Heide*, 476.

7. *Deeds and Conveyances—Description—Calls—Questions of Law—Written Contracts—Parol Evidence—Equity.*—Where the court corrects, as a matter of law, an evident mistake appearing in the face of a deed for lands, it is to effectuate the intention of the parties as it appears from the language of the conveyance itself, and the rule that a written instrument may not be varied by parol evidence, and the equitable principle applicable where the instrument itself is sought to be corrected, have no application. *Ipock v. Gaskins*, 673.

COURT'S DISCRETION. See Trials, 23.

CREDITORS' SUITS.

Wills—Devises—Creditors' Bill—Lis Pendens—Mortgages—Foreclosure—Sales—Purchasers.—Where a devisee of lands has mortgaged them, and thereafter a creditors' bill is brought to subject the lands, if necessary, to debts due by the deceased, making the devisee a party, the suit amounts to notice to all interested parties as a *lis pendens*, and where a sale of lands is decreed, the purchaser thereat acquires the equity of redemption, which the devisee has held subject to the testators debts; and where, subject to this notice of *lis pendens*, a foreclosure sale has been decreed, without making the creditors parties, and the land has been purchased by the mortgagee, he and those claiming under him are entitled to their mortgage lien on the lands, and are held accountable for the rents and profits during the time of their possession; for, being purchasers with constructive notice of the creditors' rights, the foreclosure sale is invalid as to them. *Lee v. Giles*, 541.

CUSTOMS. See Insurance, 10, 12.

CRIMINAL LAW.

1. *Verdict—Judgments—Motions in Arrest—Interpretation of Statutes.*—Upon a verdict finding that the defendant was "guilty of an attempt to commit the crime charged in the bill of indictment," the offense being that prohibited by Revisal, sec. 3349, the judgment upon the verdict may not be arrested on defendant's motion. Revisal, 3269. *S. v. Savage*, 245.

2. *Landlord and Tenant—Removing Crop—Statutory Notice—Burden of Proof—Interpretation of Statutes.*—In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days previous notice before the crop had been removed. *S. v. Harris*, 267.

3. *Instructions—Criminal Actions—Reasonable Doubt—"Fully Satisfied"—Burden of Proof—Words and Phrases.*—On trial for a criminal offense, the judge is not held to any set formula as to a reasonable doubt, in his instruction upon the quantum of proof in order to convict, and, upon conflicting evidence, an instruction that the jury "must be fully satisfied of defendant's guilt before they can convict him," is not erroneous. *S. v. Charles*, 286.

DAMAGES. See Evidence; Eminent Domain; Trials; Railroads; Carriers; Insurance; Judgments; Trespass; Reformation, Rescission and Cancellation.

1. *Instructions—Negligent Killing—Measure of Damages—Expectancy—Mortuary Tables—Earning Capacity—Evidence.*—In this action to recover damages for the alleged wrongful killing of plaintiff's intestate, the charge of the court is approved on appeal, as to the evidence of intestate's expectancy from the mortuary tables, the weight the jury should give them, and how they should consider the testimony of the intestate's earning capacity, illustrating his meaning from the evidence, and as to finding by deducting his expenses, etc., the net present loss his negligent killing has caused to his estate. *Speight v. R. R.*, 80.

2. *Same—Arguments to Jury—Corrections—Appeal and Error.*—In this action to recover damages for the negligent killing of plaintiff's intestate, wherein defendant's counsel argued to the jury that evidence of the intestate's negligence should be considered upon the issue as to the measure of damages, the judge, in undertaking to correct any erroneous impression made thereby, properly instructed the jury that they should not consider the negligence of the intestate under that issue, and that evidence of his conduct, character, and habits were only relevant on the question of his earning capacity, and further *Held* that the charge was not to plaintiff's prejudice. *Ibid.*

3. *Instructions—Construed as a Whole—Negligent Killing—Measure of Damages—Expectancy—Earning Capacity—Appeal and Error.*—When damages are sought for the negligent killing of plaintiff's intestate, their measure should not be determined conclusively upon his earning capacity at the time of his death; and while the charge of the judge in this case, by the use of the words, "what he was making," if taken alone, may be objectionable, it is not held for reversible

DAMAGES—*Continued.*

error in connection with other pertinent parts of the charge, that evidence of intestate's habits, etc., was to aid the jury in determining whether he was industrious and would be constantly employed; that the mortuary tables were evidence only of his expectancy, and that the jury must ascertain from all the evidence what his income would be. *Ibid.*

4. *Measure of Damages—Instructions—Charge as a Whole—Harmless Error.*—The judge in his charge to the jury upon the measure of damages for the negligent killing of plaintiff's intestate instructed them that they could award $500, $2,000, or any amount they concluded was right, basing their findings upon the evidence in the case as they saw it, not exceeding the amount demanded: *Held*, this charge furnished no rule for the admeasurement of damages, and standing alone was erroneous, but considered with the other part of the charge in this case, which, taken as a whole, gave the correct rule of damages, was not reversible error. *Draper v. R. R.*, 307.

5. *Damages—Fright—Physical Injury—Instructions—Appeal and Error.*—Mere fright is not considered in law as an element of damages; and where there is evidence tending to show that a railroad company negligently put a feeble passenger, at night, off of its train on the opposite side from the depot, causing fright and sickness from the exposure, an instruction that the jury might award compensatory damages for fright, disconnected from any physical injury, is reversible error. *Anderson v. R. R.*, 462.

DANGEROUS INSTRUMENTALITIES. See Master and Servant.

DEDICATION. See Municipal Corporations, 3, 4.

DEEDS AND CONVEYANCES. See Acknowledgment; Judicial Sales; Trials; Landlord and Tenant; Reformation, Rescission and Cancellation; Evidence; Trusts; Contracts; Easements; Escrow.

1. *Deeds and Conveyances—Prior to 1879—Heirs—Estates for Life.*—In the premises of a conveyance of lands made prior to 1879, the language of the deed was "unto C. and her children"; in the habendum, "unto her, the said C., and her children forever." The word "heirs" did not appear in the deed in connection with the grantees, though the warranty was that of the grantor, "his heirs and assigns": *Held*, at the time of making the deed it was necessary to pass the fee that the word "heirs" be used in connection with the title passed to the grantee, and that the grantees in the deed in question took only a life estate. *Cullen v. Cullen*, 344.

2. *Same—Equity—Mistake—Pleadings—Proof.*—Where a deed to lands made prior to 1879, passed only a life estate, by reason of the word "heirs" not having been used in connection with the grantee's title, and no equitable relief is alleged or proved on the ground of mistake, none may be granted. *Ibid.*

3. *Deeds and Conveyances—Contingent Interests—Conveyances in Fee—Title.*—Where devisees of lands take subject to contingent interests, as where the fee-simple title would vest in one upon his surviving the other, and each executes to the other a conveyance of an absolute estate in fee simple forever, of the part of the lands to be held by

DEEDS AND CONVEYANCES—*Continued.*

him in the division of the whole thereof, the agreement thus to divide by the deeds necessarily divests the estate of each grantor of its contingent character, and the grantee holds it in fee absolute. *Beacom v. Amos*, 357.

4. *Same—Tenants in Common—Estate Conveyed.*—Where a division of lands is effected by devisees upon which the will imposes certain contingent interests as between the parties, and from construing the interchangeable deeds it appears that their intent and purpose was to convey the fee-simple absolute to each other, the doctrine that where a voluntary partition of lands or one accompanied by deed has been made by tenants in common they hold the land thus apportioned subject to the contingencies imposed by the will, has no application. *Ibid.*

5. *Deeds and Conveyances—Possibilities—Contingent Interests—Assignments—Equitable Interests—Statute of Uses.*—While mere possibilities cannot be transferred at law, executory devises and contingent remainders are not considered as bare possibilities, but as certain interests and estates, and as such may be conveyed. In this suit, the question of whether the assignment passed a legal or equitable interest is immaterial, as the defendant set out the essential facts and relied upon them as a defense. *Ibid.*

6. *Liens—Purchase Money—Deeds and Conveyances.*—No lien for purchase money exists by operation of law in North Carolina in favor of the vendor; and where a grantor of standing timber only provides for the terms of deferred payment in his deed, without reserving the title, he has no lien on the timber conveyed. *Shingle Mills v. Sanderson*, 452.

7. *Deeds and Conveyances—Conditions Precedent—Nonperformance—Trespass.*—When one goes upon the lands of another under a deed which was only to be delivered upon his performance of a certain condition, which he has failed to perform, and the deed has not therefore been delivered, he is a trespasser on the lands. *Mincey v. R. R.*, 467.

8. *Deeds and Conveyances—Registration—Title—Possession—Evidence—Nonsuit—Interpretation of Statutes.*—Where in an action to recover lands it appears that the *locus in quo* was included in the plaintiff's deed made prior to the deed under which the defendant claims, which latter deed also included the lands in dispute, and was registered first, and from plaintiff's own evidence he had never been in actual possession of the lands in dispute; and it appears that it had been lived on and cultivated by the defendant and those under whom he claimed for a period of many years, both parties claiming under a common source of title, it is *Held*, that defendant's deed, being first registered, gave him the superior title (Revisal, sec. 980); and there being no evidence of plaintiff's possession on the lappage, Revisal, sec. 383, does not apply. *Mintz v. Russ*, 539.

9. *Deeds and Conveyances—Boundaries—Lappage—Constructive Possession—Color of Title—Actual Possession.*—The principles obtaining which allow the one in possession under a deed claimed as color of title to show constructive possession to the outside boundaries of the

DEEDS AND CONVEYANCES—*Continued.*

deed, including a lappage of lands embracing the *locus in quo*, do not apply where there is adverse occupation of the lands, contained in the lappage in the other party to the controversy, and the party claiming under "color" has never exercised any control over the lands amounting to acts of ownership or possession. *Ibid.*

10. *Deeds and Conveyances—Actions—Breach of Warranty—Ouster—Pleadings.*—In an action upon a breach of covenant in a deed it must be shown that there has been an ouster or eviction under a superior title. *Cedar Works v. Lumber Co.*, 603.

11. *Deeds and Conveyances—Adverse Possession—Color—Evidence—Nonsuit.*—In an action to recover lands, where the plaintiff relies on deeds describing the lands by metes and bounds as color of title and there is evidence in his behalf tending to show that he and those under whom he claims have been in open, continuous, and uninterrupted adverse possession, manifested by distinct acts of ownership under the deeds, for more than thirty years, it is sufficient to establish plaintiff's title, if the jury so finds the facts to be; and a motion to nonsuit should be denied. *Stewart v. McCormick*, 625.

12. *Deeds and Conveyances—Adverse Possession—Title—Constructive Possession—Interpretation of Statutes.*—Where a party brings his action to recover lands, and shows that he acquired title by adverse possession for more than thirty years, it follows, nothing else appearing, that he has had at least constructive seizin or possession of the lands within thirty years before he brought his suit, as required by Revisal, sec. 383. *Ibid.*

13. *Deeds and Conveyances—Color of Title—Adverse Possession—Constructive Possession—Outer Boundaries of Deed.*—Where there is no question of lappage on the lands by conflicting calls in the deeds of contesting parties and claimed by one of the parties by adverse possession under color of title, who shows possession in a part of the lands as described in his deed, the law constructively extends his possession to the external or outer boundaries of his deed. *Ibid.*

14. *Deeds and Conveyances — Color — Adverse Possession — Location of Boundaries—Nonsuit—Evidence, How Considered—Scintilla of Evidence.*—Where the plaintiff claims the land in suit by adverse possession under color of title, by deeds with definite description of boundaries, upon a motion to nonsuit the evidence is viewed in the light most favorable to the plaintiff, and the motion should be denied if there is more than a scintilla of evidence as to the location of the boundaries to the land described. *Ibid.*

15. *Deeds and Conveyances—Unregistered Deeds—Color of Title—Adverse Possession—Limitations of Actions.*—Where the parties to an action involving the title to lands do not claim from a common grantor, an unregistered deed is color of title, and evidence is admissible to show that the party claiming under the deed has held adverse possession sufficient to ripen his title. *Gore v. McPherson*, 638.

16. *Same — Registration — Vested Rights — Instructions.* — The plaintiff claimed title to the lands in dispute under a grant from the State and mesne conveyances, excluding 200 acres as being owned by the defendant. The defendant introduced in his chain of title a deed

DEEDS AND CONVEYANCES—*Continued.*

made in 1818, registered in 1912, purporting to convey five tracts of the land by separate descriptions, aggregating 335 acres: *Held*, it was competent for the defendant to show such possession as ripened his title under the description of the lands in the deed of 1818, as color, and it was error for the court to instruct the jury that if the land claimed by the defendant was embraced in those described in the plaintiff's prior grant, he could not recover. *Ibid.*

17. *Same—Evidence.*—In this case, title to the lands in controversy was admittedly out of the State, and the defendant claimed under a deed made in 1818 as color of title, which was registered in 1912, under authority of the statute: *Held*, upon the question of holding adverse possession under this deed, it was competent for him to describe the lines of the deed with reference to the lands, saying there were chops and blazes on them; that he had lived thereon for 65 years, and had planted it in corn and cotton, etc., and he and his father had been in possession to the lines he had described, etc.; and *Held further*, the evidence was competent also to show title without "color." *Ibid.*

18. *Deeds and Conveyances—References for Description—Presumption—Register of Deeds—Parol Evidence of Location.*—Where a deed purporting to convey large tracts of land refers to various former deeds in the chain of title for description, giving the county, number of book and the page, the entries necessarily refer to the books in the office of the registers of deeds of the respective counties, which become a part of the description of the conveyance in question, and when these descriptions are not too vague or uncertain, parol evidence is competent to identify the land thereunder. *Lumber Co. v. Swain*, 566.

19. *Deeds and Conveyances—Lappage on Lands—Possession—Outer Boundaries—Color—Exclusion in Boundaries.*—Where there is a lappage upon lands according to the description of plaintiff's and defendant's deeds, including the *locus in quo*, the defendant cannot establish his title thereto by seven years adverse possession under color, claiming to his outer boundaries, when muniments of title in the line claimed by the plaintiff are recognized in the deed under which defendant claims, and excludes the lands in controversy. *Ibid.*

20. *Deeds and Conveyances—Description of Lands—Parol Evidence.*—In an action to recover damages of a grantee for wrongfully cutting timber, it appeared that the deed to the timber in question described the lands on which the timber was situated as follows: "All the timber of the size and kind hereinafter named" on the tract of land in a certain named township and county, adjoining the lands of T., L.'s estate, and others, and being the tract upon which the grantor then resided, containing a stated number of acres: *Held*, the land is sufficiently described to admit of parol evidence to fit the land to the description. *Byrd v. Sexton*, 569.

21. *Same—Standing Timber—Size Not Specified—Interpretation of Deeds.*—Where a conveyance of timber on certain described lands fails to state the size of the trees to be cut therefrom, it passes title, in the quantity specified, to all the timber trees growing upon the land or lying thereon in their natural state which are capable of being

DEEDS AND CONVEYANCES—*Continued.*

sawed into merchantable lumber by the mills and methods usually employed by sawmill men in that vicinity. *Ibid.*

22. *Deeds and Conveyances—Standing Timber—Time for Cutting and Removing Timber — Extension Privilege — Intent — Interpretation of Deeds.*—Where a conveyance of standing timber on described lands provides that the grantee "shall have four years from the date of the deed to commence cutting and removing the timber, and in case the same is not commenced within that time" the conveyance and all the provisions and agreements for paying for said timber to be void, the quantity sold being 100,000 feet, with the privilege to the grantee of cutting the same amount, at the same price, in addition, which privilege was exercised and the terms of payment complied with: *Held*, from the intent gathered from the entire instrument, the grantee therein had four years from its date in which to enter upon the land and commence cutting, and having commenced cutting within that period, and given notice of his election to take the additional 100,000 feet and tendered the money within the time, he must be allowed, after the four years, the reasonable time required to continue and complete the cutting of the amount stipulated for in his deed. *Ibid.*

23. *Deeds and Conveyances—Legal Tender—Currency—Waiver.*—While it is necessary to constitute a legal tender for the purchase price of land upon demanding a deed therefor, that it be made according to the acts of Congress, specifying what is legal tender in such transactions, it is required that when the tender is made in money constituting a part of the common currency of the country and ordinarily passing as such, it should be objected to at the time on the ground that it is not legal tender; and in this case, expressions that the currency was not legal tender, and it appearing that the grantor refused to deliver the deed for other reasons, were insufficient on the plea that tender had not been properly made. *Gaylord v. Taylor*, 685.

DEFAULT. See Judgments.

DEMURRER. See Pleadings; Executors and Administrators; Parties.

DEPOSITIONS. See Evidence.

DEPOTS. See Corporation Commissions.

DESCENT AND DISTRIBUTION. See Wills.

DESCRIPTION. See State's Lands; Trials; Deeds and Conveyances.

DOCKETING. See Appeal and Error.

DOWER. See Wills.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Bonds—Landowners' Liability—Interpretation of Statutes—Notice.*—The bonds issued for the Mattamuskeet Drainage District referring to the acts under which they were issued and to the deed of Board of Education to the Southern Land Reclamation Company, and the deed securing these bonds referring to these acts

DRAINAGE DISTRICTS—*Continued.*

and to the special proceedings under which they were formed, affect the bondholders with notice of the statute and deed in question; and it appearing on the face of the bonds that they are payable three-fourths of the principal and interest out of the lands levied on the reclamation company described in its deed, and one-fourth thereof out of assessments upon all other lands "in the manner provided by law," it is *Held*, this amounts to a contract stipulation, affecting and binding upon the holder of each bond, that the obligation shall not constitute a general and pecuniary indebtedness of the district, but payable only out of the assessments as provided for by the law, and that the individual owners of the land who were originally such, and the transferees holding their title, shall never in any event be assessed for more than one-fourth of such liability. *Caravan v. Commissioners*, 100.

2. *Same—Statutes—General Clauses.*—A subsequent clause appearing on the face of bonds issued by the Mattamuskeet Drainage District, that "for the prompt payment of this bond, etc., the full faith, credit, and revenues of the said district are hereby irrevocably pledged," is construed by the general terms used, as subordinate to and controlled by the specific stipulation in the preceding clause, confining liability of the individual owner to "one-fourth of the obligation as to each bond." *Ibid.*

DUE COURSE. See Bills and Notes.

DYING DECLARATIONS. See Homicide, 9.

EASEMENTS. See Eminent Domain.

1. *Parol Contracts—Statute of Frauds—Pleadings—Evidence—Objections and Exception—Easements—Deeds and Conveyances—Prescription.*—A parol contract relating to land is voidable, and not void, and, when executed, not denied, and the statute of frauds not pleaded, and the evidence to prove it is not objected to, the statute requiring it to be in writing has no application. *Herndon v. R. R.*, 650.

2. *Deeds and Conveyances—Prescription—Railroads—Easements—Rights of Way—Parol Contracts—Statute of Frauds.*—Where for mutual considerations a railroad company in acquiring a right of way has entered into parol agreement with the owner to construct an underpass or cattle-run under its track for the use of the owner whose land lay on both sides of the railroad, and which has been fully executed, and subsequently the railroad company attempts to close up the runway, which plaintiff seeks to enjoin, the interest claimed by the plaintiff is an easement in the lands which cannot pass except by deed or prescription. *Ibid.*

3. *Same—Railroads—Easements — Principal and Agent — Ratification — Evidence—Injunction.*—The agent of a railroad company procured a deed to a right of way over the lands of the owner, and there was evidence tending to show, as a part of the consideration of the deed, that the parties had agreed by parol that the railroad should construct a siding on the lands and perpetually keep open an underpass or cattle-run under the track for the owner's convenience, and furnish wire to enclose a pasture for cattle along the right of way

EASEMENTS—*Continued.*

granted. The company furnished the wire, constructed the underpass, and subsequently attempted to fill up the underpass. In a suit seeking a permanent injunction, the defendant company pleads the statute of frauds and denies the authority of its agent to make the contract alleged. There was further evidence on plaintiff's behalf that he requested that the agreement be put in writing, was informed by the defendant's agent that it would be unnecessary, that the defendant would keep its agreement, and that, if otherwise, the laws of the State would compel it to do so, which the plaintiff, being without legal counsel, believed and acted on: *Held*, the compliance by the defendant with the terms of the parol agreement was evidence of ratification of the contract made by its agent; the plea of the statute of frauds, with the other circumstances of this case, was evidence of fraud in the procurement of the deed for the right of way, which if established would set it aside; and to preserve the *status quo* of the parties, a restraining order should be granted to the hearing.

4. *Parol Contracts—License Over Lands of Another—Revocable at Will.*—Where a right is claimed in the land of another resting in parol, whether treated as an easement or a license, it must be established by deed or prescription; for it is held that a license of this character, though based upon a valuable consideration, can be witdrawn at will. *Ibid.*

5. *Railroads—Easements—Condemnation—Measure of Damages—Water-powers—Harmless Error—Instructions—Appeal and Error.*—In proceedings to condemn lands there was evidence tending to show that there was an undeveloped water-power thereon, which was the only evidence as to the future possible use of the property. The judge charged the jury that it was only proper for them to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property; and further, specifically and correctly charged how the jury should consider the evidence on this phase of the damages: *Held*, construing the charge as a whole, no error is found, and the charge of the court is approved. *R. R. v. Gahagan*, 190.

EJECTION. See Carriers, 10.

EJECTMENT. See Trials, 40, 42.

1. *Cities and Towns—Streets and Sidewalks—Condemnation—Obstructions—Mandatory Injunction—Ejectment.*—The remedy of an incorporated city and town requiring the lands of private owners for the purposes of laying off streets is by condemnation proceedings; and whether a mandatory injunction may be granted to have an obstruction in its streets removed, in proper instances, or whether an action of ejectment would lie, *Quære*. *Green v. Miller*, 24.

2. *Partition—Pleas—Sole Seizin—Ejectment—Parties.*—When in adversary proceedings to partition lands resistance is made under the plea of sole seizin under a deed from the petitioners to the *locus in quo*, the proceeding, in legal effect, becomes an action of ejectment under the general issues thus raised, with the petitioners as plaintiffs and their adversaries as defendants. *Sipe v. Herman*, 107.

EJECTMENT—*Continued.*

3. *Same—Parties—Burden of Proof—Possession—Bond.*—When proceedings for partition of lands, by the plea of sole seizin, becomes in legal effect an action of ejectment, the burden of proof is on the plaintiffs to establish their title, and the defendants, in possession, are required to give bond. *Ibid.*

4. *Partition—Sole Seizin—Ejectment—Deeds and Conveyances—Title—Evidence—Judgments.*—When in proceedings to partition lands the tenancy in common is not denied, except that the defendant claims sole seizin under a deed from the plaintiff to their interest in the lands, in the absence of evidence of the defendants tending to show a good and sufficient deed upon which they rely, judgment is properly rendered for the plaintiff. *Ibid.*

5. *Same—Married Women—Privy Examination.*—Sole seizin being relied upon in an adversary proceeding to partition lands, under a deed alleged to have been made by the *feme* plaintiff, a tenant in common, with her husband, but without her privy examination, it is *Held*, that the deed of the *feme* plaintiff is void, and as no title passed thereunder, the defendants failed to show a superior title, and the defense must fail. *Ibid.*

EMINENT DOMAIN. See Reformation, Rescission and Cancellation, 7.

1. *Cities and Towns—Streets and Sidewalks—Condemnation—Obstructions—Mandatory Injunction—Ejectment.*—The remedy of an incorporated city and town requiring the lands of private owners for the purposes of laying off streets is by condemnation proceedings; and whether a mandatory injunction may be granted to have an obstruction in its streets removed, in proper instances, or whwether an action of ejectment would lie, *Quære. Green v. Miller*, 24.

2. *Railroads—Easements—Condemnation—Good Faith—Pleadings—Issues—Interpretation of Statutes.*—When in proceedings by a railroad company to condemn lands the answer denies the intention of the petitioner in good faith to construct the proposed railroad (Revisal, sec. 2580), the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the Superior Court in term, under the provisions of Revisal, sec. 529; and section 2588, construed in connection with section 529, which provides only for a jury trial on appeal from the amount of damages assessed by the appraisers, excludes the idea that the question of good faith should in like manner be tried. *R. R. v. Gahagan*, 190.

3. *Railroads—Easements—Condemnation—Damages—Costs—Appeal and Error.*—In proceedings brought by a railroad company to condemn lands, it was found by the jury on appeal to the Superior Court that defendant's benefit therefrom exceeded his damages, the assessors having found they were equal: *Held*, the costs were taxable against the plaintiff accruing up to the time of appeal from the clerk, and against the defendants appealing from the Superior to the Supreme Court, the judgment of the Superior Court being affirmed. *Ibid.*

4. *Railroads—Condemnation—Crossing Other Railroads—Sidings—Interpretation of Statutes.*—Where a railroad company is given by its charter the right to build its road, acquire rights of way by condemnation, etc., to intersect any other railroad upon the grounds thereof; to build sidings, switches, sidetracks, etc., and in making

EMINENT DOMAIN—*Continued.*

intersections with other railroads to have all the rights and privileges conferred upon railroads of this State, it is given authority, both by its charter and Revisal, 2556 (5) and (6), to condemn and acquire a right of way across the road of another company in order to construct a siding to manufacturing plants or other business enterprises for the handling of their freight. *Butler v. Tobacco Co.*, 152 N. C., 416, distinguished. *R. R. v. R. R.*, 531.

5. *Same—Mutual Consideration—Change of Crossing—Assessing Damages—Findings of Court—Questions for Jury.*—A railroad company having the power of condemnation across the road of another company should exercise this right with due regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience; and it appearing in this case that the defendant had a spur track or siding where the plaintiff company proposed to cross it, and that the plaintiff may reasonably be required to cross at a point beyond the end of the defendant's spur, it is *Held* that the trial court, in a reconsideration of this case, will adjudge as to the feasibility of the suggested alteration of the plaintiff's route, and call in the aid of the jury if necessary, any additional cost to the plaintiff to be considered in diminution of the defendant's damages. *Ibid.*

6. *Railroads — Condemnation — Crossing Other Roads—Immaterial Matters—Competition—State Policy.*—Where a railroad company has a a right to condemn a way across the track of another company to manufacturing plants or business places, for a side or spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. *Semble*, it is the policy of the State to encourage competition among common carriers for the advantage of the public. *Ibid.*

ENTIRETIES. See Husband and Wife.

ENTRY. See State's Lands, 3, 4, 6, 7.

ESCROW.

1. *Deeds and Conveyances—Parol Contracts to Convey—Escrow—Condition Precedent—Offer to Sell—Acceptance—Payment.*—Where a principal, acting on a parol agreement made by his agent, executes a deed to lands and delivers it into his agent's hand for delivery upon payment of the purchase price, the transaction is an offer to buy, and an acceptance with the condition precedent that the purchase price is first to be paid; and this condition is not performed by a part payment and an agreement between the purchaser and the agent that the latter will retain possession of the deed and deliver it upon the payment of the balance of the price. *Binford v. Steele*, 660.

2. *Deeds and Conveyances—Parol Contracts to Convey—Principal and Agent—Escrow—Offer to Sell—Acceptance—Withdrawal of Offer—*

ESCROW—*Continued.*

Payment—Notice.—Where a proposed purchaser of lands does not pay the full purchase price therefor to the seller's agent upon the latter's tendering a deed, when payment in full is a condition precedent to the delivery, and thereafter the seller withdraws his deed from his agent's possession, and the purchaser, knowing the deed had been withdrawn, pays the balance which was to have been due by him under the arrangement between him and the agent, in his action against the seller to recover the purchase price he has thus paid to the agent, and which the agent has retained, he is not entitled to the money represented by his first payment, for he has not complied with the condition precedent to the delivery of the deed; nor the balance of the purchase money, for this he had paid after he had knowledge that the agent's authority had ceased. *Ibid.*

3. *Deeds and Conveyances—Escrow—Principal and Agent—Contracts to Convey—Withdrawal of Offer—Notice—Payment — Pleadings — Evidence.*—Upon the question of whether a purchaser of lands had notice of an agent's limited authority in delivering the deed unless the purchase money was paid in a specified time, and that failing this payment the seller had withdrawn the deed from his agent's hands, an allegation of the purchaser, in his complaint in an action to recover money he had since paid to the agent, that the deed had been withdrawn, is some evidence of his knowledge thereof; and his evidence that he did not remember having made the statement, only affects its credibility. *Ibid.*

4. *Deeds and Conveyances—Contracts to Convey—Offer to Sell—Escrow —Principal and Agent—Withdrawal of Deed—Notice—Evidence— Revocation.*—Where by delivering a deed to his agent in pursuance of a parol proposition to buy his lands, the seller has in effect offered to sell them, he may withdraw his offer, nothing else appearing, at any time before the purchaser's final acceptance by payment of the full amount of the agreed purchase price; and where the seller has withdrawn his deed, before payment, from the hands of his agent, with the knowledge of the purchaser, the withdrawal of the deed is some evidence of the notice to the purchaser that the offer had been revoked. *Ibid.*

5. *Deeds and Conveyances—Escrow—Trespass on Lands — Injunction— Disputed Facts—Injury to Lands.*—Where in an action to recover lands an injunction is sought, as a part of the relief, for a continuous trespass upon the lands, and it is put in issue as to whether a deed from the plaintiff's deceased mother, under which he claims, was placed in escrow to be delivered unconditionally upon her death, or whether it was to be held in escrow until the payment of her debts, of which there were several outstanding and constituting claims upon her estate, and it is claimed that under the conditions of the escrow the defendant was to manage the lands and pay the debts out of the rents and profits, it is *Held*, that upon these disputed facts, and it appearing that pending the litigation the threatened acts of defendant would produce injury to the plaintiff, a restraining order should issue to the hearing. Revisal, secs. 806, 807. *Semble*, as in this case the court had required the plaintiff to pay his share of the debts against the estate, the defendant could not be prejudiced by the restraining order. *Sutton v. Sutton*, 665.

ESTOPPEL.

Contracts—Possession in Subordination to Another's Title—Estoppel.—Where one acquires possession of land by contract or agreement with another, and in subordination to his title, he is estopped to deny that title until he has surrendered the possession so acquired and placed the one with whom he has thus dealt at arm's length with himself. *Nance v. Rourk*, 646.

EVIDENCE. See Vendor and Purchaser; Acknowledgement; Fraud; Master and Servant; Trials; Courts; Appeal and Error; Damages; Homicide; Statutes; Telegraphs; Insurance; Deeds and Conveyances; Judgments; Contracts; State's Lands; Wills; Pleadings; Statute of Frauds; Injunction; Escrow.

1. *Evidence—Questions for Jury.*—Upon a rehearing of this case it is held that the rules of law heretofore laid down are correct; but upon reconsidering the facts, the majority of the Court hold the evidence sufficient to be submitted to the jury. *Peele v. Powell*, 50.

2. *Intoxicants—Contracts—Illegal Consideration—Conjectural Evidence—Liquor Dealers—Checks—Burden of Proof.*—When the payment of checks is resisted on the ground that they were given for the purchase of intoxicating liquors in North Carolina, prohibited by our prohibition laws, the burden is on the defendants to show that they were so given, and mere conjectural circumstances or probabilities are not evidence sufficient; and no presumption of illegality arises from the fact that the plaintiffs were liquor dealers, or that the defendants kept a restaurant and dealt in "soft drinks," etc., and not in intoxicants. *Ibid.*

3. *Evidence—Nonsuit—Instruction—Appeal and Error—Practice.*—The question of the sufficiency of the evidence to submit the case to the jury can only be considered on appeal by an exception to the refusal of the trial court to grant a motion of nonsuit or to give a proper prayer for instruction to that effect. *Holder v. Holder*, 177.

4. *Railroads—Negligence—Objects Upon Track—Observation of Engineer—Evidence.*—When a railroad company is sued for damages for the negligent killing of the plaintiff's intestate, alleged to have been run over at night by the defendant's train, while he was lying drunk and helpless upon the track, and there is evidence on the part of defendant tending to show that the train could not have been stopped under 200 yards, and that the engineer could not have seen the intestate at that distance, owing to his position on the track, with an electric headlight, with which the locomotive was equipped, evidence is competent to show that a man standing on the track where the intestate was killed could have been seen a distance of 400 or 500 yards by the engineer, as a circumstance upon the question within what distance the engineer could have seen a man down upon the track. *Draper v. R. R.*, 308.

5. *Same—Stopping Train—Opinion—Harmless Error.*—When the question at issue is whether the engineer on defendant railroad company's train could have stopped the train, at the speed it was then running, in less than 200 yards, or in time to have avoided the killing of the plaintiff's intestate from the time he could have been seen down on the track by the electric headlight of the locomotive, it is in-

EVIDENCE—*Continued.*

competent for witness of the plaintiff to testify that a passenger train could have been stopped in 75 yards, unless the testimony were based on the facts in evidence as to the speed of the train, its length and weight, and the condition of the track; but held harmless error in this case, as the witness further testified that he knew nothing of the distance it would take a train, such as the one in evidence, to stop, under the existing conditions and circumstances. *Ibid.*

6. *Same.*—When in an action to recover of a railroad company damages for the alleged negligent running over and killing of plaintiff's intestate the question at issue was the distance within which the train could, under the circumstances, have been stopped, it was competent for plaintiff's witness to testify that this could have been done within 200 yards, especially when the defendant was endeavoring to establish that fact, as in this case. *Ibid.*

7. *Same—Positive Evidence—Instructions.*—The testimony of defendant railroad company's engineer as to whether he could discover the plaintiff's intestate down upon the track in time for him to have stopped the train under the circumstances to avoid the injury complained of, and that of plaintiff's witness in contradiction, are of the same character of evidence, and it was not an error in the court to refuse to instruct the jury that the engineer's testimony was positive and that plaintiff's witness was not positive, the only difference between the two being that the jury may consider the better opportunity of the engineer to know. *Ibid.*

8. *Same—Evidence—Stopping Train—Ordinary Care—Questions for Jury.*—In an action to recover of a railroad company damages for negligently killing the plaintiff's intestate at night, it was admitted that it was the defendant's train that killed him; there was evidence that he was down and helpless on the track; and as to whether the defendant's engineer used ordinary care in stopping the train in time to avoid the killing, defendant's engineer testified the train could have been stopped within 200 yards, and that he discovered the object upon the track to be a man when 160 yards distant. It was also in evidence that a man standing could be seen by the aid of the electric headlight on the engine a distance of 400 or 500 yards: *Held*, it was a question for the jury to decide whether the engineer, in the exercise of ordinary care, could have discovered the object down on the track more than 200 yards away, and that he could have stopped the train in time to avoid the killing, after he had discovered it was a man. *Ibid.*

9. *Same—Opinion Evidence.*—In an action for damages for the negligent killing of plaintiff's intestate, who was down and helpless on the track and thus run over by the defendant railroad company's train, involving the question as to whether the engineer, by the exercise of ordinary care, should have stopped the train in time to have avoided the killing, the jury are not bound by the opinions of the witnesses as to the distance within which the train could be stopped, and may consider the evidence of the condition of the track, the grade, the length and weight of the train, the speed, and other relevant circumstances in connection with these opinions, and from the whole evidence determine within what distance it could have been stopped. *Ibid.*

EVIDENCE—*Continued.*

10. *Deeds and Conveyances—Reformation—Pleadings—Evidence—Burden of Proof.*—A conveyed the timber growing on certain described lands to B, who conveyed to C. Thereafter C obtained from A a conveyance, referring for description to the first deed, granting an extension of time within which to cut and remove the timber. In a suit brought by A against C to correct the deeds for mutual mistake in the quantity of timber conveyed, the plaintiff must either show that C purchased from B with knowledge of his equity, or allege and prove that there was mutual mistake in the conveyance extending the time for cutting the timber. *Dameron v. Lumber Co.*, 495.

11. *Hypothetical Questions—Evidence.*—A hypothetical question which presupposes the existence of facts of which there is no evidence is incompetent. *Ibid.*

12. *Evidence—Depositions—Commissions—Names of Witnesses—Harmless Error.*—Where in the same action two sets of depositions are taken of the same witnesses, and in one of the commissions issued therefor the witnesses are not named, and in the other they are named, and the evidence is substantially the same in both depositions, which are introduced at the trial, if any error was committed in permitting the depositions to be introduced under the commission not naming the witnesses, it was rendered harmless by the introduction of the depositions taken under the other commission, naming them. *Dunie v. R. R.*, 520.

13. *Railroads—Negligence—Principal and Agent—Scope of Agent's Authority—Declaration — Rumors — Hearsay Evidence.*—Where a railroad company is sued for the negligent killing of plaintiff's intestate, a fireman on defendant's train, owing to an alleged negligent defect in defendant's water spout he was required to use in filling the locomotive with water, declarations of a station hand as to the condition of the spout, in plaintiff's favor, are not within the scope of the declarant's agency, and inadmissible as hearsay; likewise, rumors in the neighborhood to that effect, the latter being of less probative force than the former. *Barnes v. R. R.*, 581.

14. *Evidence—Instruction—Testimony of One Witness—Appeal and Error.*—Where damages are sought of a railroad company for negligence in failing to supply its fireman with a proper appliance for his work, resulting in injury, and only one witness, defendant's engineer, had testified to a certain state of facts bearing thereon, a charge of the court that if the jury believed the injury occurred as one of the engineers said it did, particularizing the testimony, to answer the issue of contributory negligence "Yes," is not objectionable as singling out the evidence of one witness for the instruction, the instruction being upon the only evidence offered on that phase and pointed out to the jury by giving the name of the witness testifying thereto. *Ibid.*

15. *Evidence—Declarations—Transactions and Communications with Deceased Person—Interpretation of Statutes.*—Where the plaintiff and defendant claim title to lands under the same deed, the former seeking to engraft a parol trust thereon, testimony of the grantor as to transactions and communications with the deceased grantee

EVIDENCE—*Continued.*

tending to establish the trust is objectionable under Revisal, sec. 1631. *Boney v. Boney*, 614.

16. *Deeds and Conveyances—Parol Trust—Declarations—Knowledge of Grantee—Evidence.*—Where a parol trust is sought to be engrafted on a deed to lands purchased at a sale, testimony as to matters passing between other persons tending to establish an agreement that the purchaser should hold the land is trust in incompetent, unless knowledge and acquiescence thereof on his part can be proved. *Ibid.*

17. *Evidence—Deeds and Conveyances—Letters—Res Inter Alios Acta.*—Where it is alleged that the defendant held the lands conveyed to him in trust for the plaintiff, letters passing between other parties, not written by or to him or with his authority, tending to establish the plaintiff's contention, are *res inter alios acta. Ibid.*

18. *Evidence—Depositions Introduced in Part—Harmless Error.*—*Semble*, it is not error to exclude part of depositions offered in evidence, but held immaterial in this case where the whole cross-examination of the witness was offered, and the examination in chief which the appellant was required to introduce could not have affected the matter. *Ibid.*

19. *Evidence—Depositions—Agreement of Counsel—Objections Taken at trial—Practice.*—Where the counsel for both parties to the action have agreed that it may be done, the trial judge may pass upon, at the trial, objections to evidence contained in depositions which had been introduced. *Ibid.*

20. *Evidence—Accusations Not Denied—Refusal to Make Statements—When Acquiescence Not Implied.*—The doctrine that silence in the presence of an accusation is some evidence of acquiescence therein should be received with great caution, and is not recognized where the accusation is made by a hostile party for the purpose of procuring evidence, when silence may be the only prudent course; and when it appears, as in this case, that the defendant was shown by a witness letters passing between others, and which he had not authorized, containing matters relating adversely to his interest, and involved in an action brought soon thereafter, and which he read, and, to the reiterated demands of the witness for a statement, said he would make no statement for fear he might say something he would later regret, his conduct affords no evidence that he assented to the truth of the statement made in the letters. *Ibid.*

EXCUSABLE NEGLECT. See Justice of the Peace.

EXECUTION. See Appeal and Error; Trials; Judgments.

EXECUTORS AND ADMINISTRATORS. See Taxation, 10; Wills, 15.

1. *Executors and Administrators—Petition for Sale of Lands—Assets—Demurrer—Appeal and Error.*—Where an administrator petitions for the sale of lands to make assets to pay the debts of the deceased, and among these is a debt which the heirs at law contend is fraudulent, as to whether an appeal will lie from a judgment sustaining the plaintiff's demurrer to the answer, a sale of the land necessarily having been ordered so as to make assets, *Quære. Best v. Best*, 513.

EXECUTORS AND ADMINISTRATORS—*Continued.*

2. *Executors and Administrators—Petition for Sale of Lands—Assets—Heirs at Law—Pleas—Statute of Limitations—Judgments—Fraud.*—The heirs at law of deceased person, whose administrator has petitioned for the sale of his lands to make assets to pay his debts, may, in protection of the real estate, plead the statute of limitations in the suit of a debtor whenever such plea would be available to the administrator (or executor) in protection of the personality, except where the debtor's claim is evidenced by a subsisting judgment against the administrator (or executor), the heirs at law are concluded as to its validity, unless the judgment can be successfully assailed on the ground of fraud and collusion. *Ibid.*

3. *Executors and Administrators—Judgment—Debt—Heirs at Law—Fraud—Pleadings.*—Where the heirs at law of the deceased attack a judgment obtained against his administrator for fraud and collusion, which appears upon its face to be a valid subsisting judgment, it is not sufficient to allege in general terms that there has been fraud and collusion, for the facts constituting the alleged fraud must be stated with sufficient fullness and certainty to indicate the fraud charged and to apprise the offending party of what he will be called upon to answer. *Ibid.*

4. *Executors and Administrators—Final Settlement—Further Collection of Assets.*—The powers and duties of an administrator do not necessarily cease because a final settlement had formally been made by him; and when he has not expressly been discharged from further execution of the trust, he still has the power, and may be under obligation, to continue to collect assets when the opportunity is further presented. *Ibid.*

5. *Same—Judgments—Fraud—Pleadings.*—Where the heirs at law of a deceased person seek to set aside a judgment for fraud and collusion, obtained against his administrator, the allegations are insufficient which merely allege that the administrator, having qualified for the purpose of furthering the collection of a debt due to his own father's estate, failed to plead the statute of limitations to the judgment obtained; that the administrator of the one to whose estate the debt was claimed to be due had made a final settlement without including this debt as an asset, and there is no suggestion that the original demand on which the judgment was rendered was not a just debt, and it is admitted it was never paid. *Ibid.*

EXPERT EVIDENCE. See Trials, 24.

FALSE REPRESENTATIONS. See Vendor and Purchaser, 9.

FEDERAL COURTS. See Courts, 5.

FRAUDS. See State's Lands; Trusts; Trials; Bills and Notes; Executors and Administrators; Contracts; Vendor and Purchaser.

1. *Contracts—Vendor and Vendee—Fraud—Misrepresentations—Principal and Agent—Evidence—Questions for Jury.*—A representation made by the agent of a vendor in the sale of 150 sewing machines, that he would give the vendee certain exclusive territory; that a certain agency therein was discontinued; that no further sales would be made through it; that the existing agency had on hand only three

FRAUDS—*Continued.*

machines, when in fact a much greater number were on hand there, and at the time of the transaction an order had been accepted by the agent from such other agency of 100 machines to be sold in the territory promised the vendee, is not of a promissory character and upon conflicting evidence, and further evidence tending to show that the vendee would not otherwise have made the purchase, a question of fraud is raised to be determined by the jury, as to whether the representation was a false statement of existing facts, calculated to deceive, intended to deceive, and which did deceive the vendee and formed a material inducement for the contract of purchase. *Machine Co. v. Bullock*, 1.

2. *Same—Caveat Emptor.*—When the agent of a vendor of sewing machines knowingly and fraudulently induces a contract of purchase upon the representation that the vendee was to have certain exclusive territory, and that a certain agency in a near-by town had been discontinued, which covered a part of the territory contracted for, etc., the vendee had a right to rely upon the truth of the assertion made by the vendor's agent, and it was not required of him that he verify the statement before entering into the contract, and the doctrine of *caveat emptor* does not apply. *Iid.*

3. *Contracts—Vendor and Vendee—Fraud—Rescission—Notification—Rule of the Prudent Man.*—The defendant having contracted with the plaintiff for the purchase of a large number of sewing machines, induced by the fraudulent misrepresentations of the latter's agent as to exclusive territory, when the agent knew at the time it was largely occupied by another to whom he had sold like articles, it was for the jury to determine whether the defendant acted as an ordinarily prudent man would have done in not sooner notifying the plaintiff of his election to rescind the transaction, under evidence tending to show that he so notified the plaintiff when he discovered the fraud while working the territory contracted for, about eighteen days after he could probably have sold any of the machines. *Ibid.*

4. *Contracts, Written—Parol Evidence—Fraud — Stipulations — Principal and Agent—Statute of Frauds.*—The principle that a written contract may not be contradicted or varied by parol evidence has no application when the writing itself is attacked for fraud; for if the contract is vitiated by fraud, its provisions are carried with it, and a clause in a contract of sale that it may not be varied by the representations of the sales agent cannot have any effect if the contract itself fails. Instances in which promissory representations may be false and vitiate a written contract, as where they include misrepresentations of existing facts, cited and discussed by WALKER, J. *Ibid.*

HIGHWAYS.

Roads and Highways—Timber—License Tax—Uniformity—Constitutional Law.—An act which makes it a misdemeanor, punishable by a fine not exceeding $50, for any person or corporation to carry on the business of hauling logs, timber, or lumber over road districts laid out and created in a certain county without having obtained a license therefor, to be issued by the road commissioners in a prescribed manner, grading the license with reference to the number of horses

HIGHWAYS—*Continued.*

driven to the wagon used, the money collected to be paid over to the treasurer of the county by the road commissioners, and held to the credit of the district collecting it, is uniform in its application, and not discriminative, and is not repugnant to the State Constitution, Art. V, sec. 3; Art. I, sec. 7; Art. I, sec. 17; and to the fourteenth amendment to the Constitution of the United States. *S. v. Holloman*, 139 N. C., 642; *Dalton v. Brown*, 159 N. C., 175, cited and applied. *S. v. Bullock*, 223.

HOMESTEAD. See Judicial Sales, 1; Judgments, 4.

HOMICIDE.

1. *Murder—Instructions—"Deliberation or Premeditation"—Charge Construed as a Whole—Appeal and Error.*—Upon a trial for murder, a charge of the court, under pertinent evidence, to find the prisoner guilty of murder in the first degree, if the jury were satisfied beyond a reasonable doubt that the prisoner fired the fatal shot with "premeditation or deliberation," is not held for error because of the use of the disjunctive "or" for the conjunctive "and," it appearing that the use of that word was an inadvertence; and it further appearing from the charge, construed as a whole, that the court charged that the shooting should have been done with "deliberation and premeditation" in order to convict him. *S. v. Logan* 235,

2. *Same—Interpretation of Statutes—Harmless Error.*—Under our statute, Revisal, sec. 3631, a murder committed in the perpetration of a robbery, which the evidence in this case discloses, is murder in the first degree, and an instruction in such instances which uses the disjunctive "or" for the conjunctive "and," as, if the jury should be satisfied beyond a reasonable doubt that the prisoner killed the deceased with "premeditation or deliberation," to find him guilty of murder in the first degree, is immaterial, and is not held for reversible error. *Ibid.*

3. *Murder—Circumstantial Evidence—Footprints—Opinion Upon the Facts.*—Upon trial for murder in the first degree for the shooting of deceased at night through a window of his dwelling, there was evidence tending to show bad blood existed between the prisoner and deceased, with threats by the former on the life of the latter, and other circumstantial evidence tending to establish the guilt of the prisoner: *Held*, that testimony of a witness was competent that there were footprints at the time of the shooting leading from the window through which the fatal shot was fired to the dwelling of the prisoner, corresponding with the prisoner's shoes; that upon placing the prisoner in these footprints, they corresponded with his shoes, and placing him unwillingly at the window with a leveled gun, it was ascertained that he could readily have fired and killed the deceased at the place the latter had been shot. *S. v. Thompson*, 238.

4. *Murder — Evidence — Instructions—Less Offense—Harmless Error.*—Upon evidence ample for conviction of murder in the first degree, for which the prisoner was convicted, a charge of the court, that if it satisfied the jury beyond a reasonable doubt that the prisoner slew the deceased with a deadly weapon they should at least con-

HOMICIDE—*Continued.*

vict him of murder in the second degree, is harmless, and an exception thereto immaterial. *S. v. Johnson*, 264.

5. *Murder—Threats—"Jest or Earnest"—Evidence—Premeditation—Manslaughter—Harmless Error.*—Upon this trial for murder there was competent evidence of the prisoner's prior threat to whip the deceased: *Held*, it was competent for a witness in defendant's behalf to answer a question as to whether "he seemed to be in jest or earnest," not being objectionable as opinion evidence, but a statement of a matter of observation; and *Held further*, to be harmless error upon a conviction of manslaughter, as it was competent only as tending to show premeditation, which was not necessary to be established on a conviction for that offense. *S. v. Tate*, 280.

6. *Homicide—Dying Declarations—Harmless Error.*—On this trial for murder there was evidence that the prisoner had cursed the deceased, threatened his life, told him he would kill him, fired the fatal shot, started to shoot again, but was begged by deceased to desist, as he had already killed him, shortly followed by death: *Held*, evidence of the declarations of deceased made after he had been shot, under the circumstances, is competent as dying declarations. *Ibid.*

7. *Murder—Secret Assault—Evidence—Instructions.*—Upon this trial for murder there was evidence in behalf of the prisoner tending to show that after he had abandoned the fight and was walking away, the deceased began firing upon him: *Held*, the charge of the judge upon the principles of law relating to a secret assault and the rights of the prisoner to pursue the deceased until he had secured himself from danger is approved. *Ibid.*

8. *Murder—Instructions—Charge, How Construed—Harmless Error.*—While it appears that in one part of the charge the court made the reasonable apprehension of danger to rest upon the evidence of the prisoner, upon his trial for murder, it also appears, taking the charge as a whole, that it was an inadvertence, which was corrected elsewhere and repeatedly stated, and no reversible error is found. *S. v. Price*, 158 N. C., 650. *Ibid.*

9. *Murder—Flight and Concealment—Evidence—Appeal and Error.*—In connection with the other circumstances of this trial for murder, the flight and concealment of the prisoner, while it raised no presumption of law as to guilt, was held competent. *Ibid.*

10. *Homicide—Motive—Evidence—Res Gestæ.*—On a trial for murder, a conversation by a witness with the prisoner, in which the latter said, with reference to the deceased, that "the tale about his poisoning dogs all over the county was the cause of all the trouble," was competent as evidence of a motive for the homicide; and the circumstances under which the witness and prisoner met and what was done at the time of the conversation, being *pars rei gestæ*, are competent as throwing light on what was said. *S. v. Bradley*, 290.

11. *Appeal and Error—Character Witnesses—Questions and Answers—Harmless Error.*—An answer favorable to the prisoner, on trial for murder, to an objectionable question asked a witness, as to whether

HOMICIDE—*Continued.*

he thought a man who would do certain specified things is a man of good character, is harmless error. *Ibid.*

12. *Murder—Instructions—Mutual Combat—Evidence—Record — Harmless Error.*—On a trial for murder, where there was no evidence in the case that the prisoner and deceased were engaged in a mutual combat on legal terms, but it appeared that the prisoner was all of the time the aggressor, and the defendant was convicted of murder in the second degree: *Held,* it is not reversible error for the judge to have charged the jury upon the phase of mutual combat; as, under the circumstances of this case, an instruction would have been proper that there was no evidence of manslaughter, the killing with a deadly weapon having been shown and not denied, and the burden of proving facts in mitigation and excuse being on the defendant. *Ibid.*

HUSBAND AND WIFE.

1. *Husband and Wife—Actions—Joinder of Husband—Interpretation of Statutes.*—While a wife may sue in her own right to recover her lands, her husband may join therein to assist her in the vindication of her right (Revisal, sec. 408). *Sipe v. Herman,* 107.

2. *Same—Registration.*—In an action by the husband and wife to recover the lands of the latter, in which defendants claim sole seizin under a deed from them both, but without the wife's privy examination, the recorded deed is not evidence, as it is void as to the wife, and no judgment could be rendered to dispossess her, or to the prejudice of her possession as against the husband, especially when the husband is suing in the right of the wife. *Ibid.*

3. *Estates—Husband and Wife—Tenant by the Curtesy Initiate—Constitutional Law.*—The estate of the husband as tenant by the curtesy initiate is abolished by Article X, sec. 6, of the Constitution, leaving the wife's land, a part of her separate estate, her sole and exclusive property. The incidental right of the husband in his wife's land discussed by WALKER, J. *Ibid.*

4. *Estates—Entireties—Husband and Wife—Privy Examination.*—A lease of lands for ten years by a husband and wife, which is held by them in entireties, without the privy examination of the wife, is void as to the latter. *Greenville v. Gornto,* 341.

5. *Estates—Entireties—Common Law—Lessor and Lessee*—Estates held by husband and wife by entireties possess the same properties and incidents as at common law, and while neither may convey them so as to defeat the right of the survivor to the whole, the husband alone may lease them during their joint lives, or until the death of his wife. *Ibid.*

6. *Same—Constitutional Law.*—The properties and incidents to estates held in entirety by husband and wife are not changed or affected by Article X, sec. 6, of our State Constitution as to the rights of married women. *Ibid.*

7. *Married Women—Judgments—Costs—Contracts.*—The adjudication of costs against the losing party to an action is not contractual, but

HUSBAND AND WIFE—*Continued.*

the creature of statute, and therefore bears no relation to the law regulating the liability of married women under their executory contracts. *LaRoque v. Kennedy*, 450.

8. *Married Women—Judgments—Costs—Execution Against Lands.*—Where a nonresident married woman has unsuccessfully prosecuted her action, and costs are taxed against her, execution may be issued on her lands situated here. *Ibid.*

IN FORMA PAUPERIS. See Appeal and Error, 18.

INJUNCTION. See Trespass, 1, 2; Judgments, 5; Municipal Corporations, 15.

1. *Municipal Corporations—Dedication—Purchaser—Mandatory Injunction.*—Under conflicting evidence as to whether the purchaser of a lot of land in a tract which had been platted and mapped by the original owner had notice of a street appearing on the map, which he had obstructed, the jury having found in the negative, it is reversible error for the trial judge to grant a mandatory injunction compelling the defendant to desist from obstructing the street, and his judgment will be reversed on appeal. *Green v. Miller*, 24.

2. *Cities and Towns—Streets and Sidewalks—Condemnation—Obstructions—Mandatory Injunction—Ejectment.*—The remedy of an incorporated city and town requiring the lands of private owners for the purposes of laying off streets is by condemnation proceedings; and whether a mandatory injunction may be granted to have an obstruction in its streets removed, in proper instances, or whether an action of ejectment would lie, *Quære. Ibid.*

3. *Injunction—When Evidence Sufficient.*—Where the main purpose of an action is to obtain a permanent injunction, and the evidence raises serious question as to the existence of facts which make for plaintiff's right and sufficient to establish it, a preliminary restraining order will be continued to the hearing. *Herndon v. R. R.*, 650.

4. *Deeds and Conveyances—Escrow—Trespass on Lands—Injunction—Disputed Facts—Injury to Lands.*—Where in an action to recover lands an injunction is sought, as a part of the relief, for a continuous trespass upon the lands, and it is put in issue as to whether a deed from the plaintiff's deceased mother, under which he claims, was placed in escrow to be delivered unconditionally upon her death, or whether it was to be held in escrow until the payment of her debts, of which there were several outstanding and constituting claims upon her estate, and it is claimed that under the conditions of the escrow the defendant was to manage the lands and pay the debts out of the rents and profits, it is *Held*, that upon these disputed facts, and it appearing that pending the litigation the threatened acts of defendant would produce injury to the plaintiff, a restraining order should issue to the hearing. Revisal, secs. 806, 807. *Semble*, as in this case the court had required the plaintiff to pay his share of the debts against the estate, the defendant could not be prejudiced by the restraining order. *Sutton v. Sutton*, 665.

INSURANCE.

1. *Insurance, Indemnity—Policy Contracts—Limited Liability—Judgments—Interest—Appeal and Error.*—A policy indemnifying an em-

INSURANCE—*Continued.*

ployer against loss for injuries received by his employees, limiting the insurer's liability in a certain sum for an injury caused to one person, containing a provision excluding the insured's interference with a settlement or the defense of an action brought by the employee, and requiring that no action shall lie against the insurer "respecting any loss or expense under this policy unless it shall be brought by the assured himself," does not exclude the insurer's liability for interest on a final judgment rendered against the insured, though, with the interest added, the amount of recovery exceeds that limited specifically in the policy. *Manufacturing Co. v. Indemnity Co.*, 19.

2. *Insurance, Fire—Delivery—Intent.*—The intent of the parties as to whether policies of fire insurance were to be valid and subsisting contracts between them will control the question of delivery, and their manual delivery to the insured, or to the parties authorized to represent him, is *Held* not to be essential in this case to make them binding upon the companies. *Manufacturing Co. v. Assurance Co.*, 88.

3. *Same—Manual Delivery.*—When a policy of fire insurance is placed by the insurer into the hands of the authorized agent of the insured, and nothing remains but to make delivery to him, without any further action on the part of the insured being necessary, except the mere formal act of receiving the policy, then the agent is presumed to hold the policy for the insured, and the contract is binding. *Ibid.*

4. *Insurance, Fire—Policy Contract—Principal and Agent—Renewals—Contracts—Acceptance.*—A secretary of a manufacturing concern was also a partner in a local fire insurance agency designated as A. and as such obtained policies of insurance through his agency on the company's property, intending to substitute them for policies already issued and accepted in renewal by another agency, designated as B, and held the policies of agency A in his desk at the office of that agency, while endeavoring to get a better rate of insurance to meet that of agency B. In the meanwhile the property was destroyed by fire: *Held*, (1) the issuance of the policies by the agent, without the knowledge or consent of either party, was invalid; (2) it was necessary that the minds of the contracting parties agree in order to make a valid contract, and the policies of agency A being refused by the proper officer of the insured, superior to that of the secretary, and those in renewal of agency B being accepted by him, there was no valid contract which would put in force the policies of agency A, or make a binding contract on the companies represented by it. *Ibid.*

5. *Insurance—Policy Contracts—Consideration—Agreement as to Rates.*—A contract is not enforcible if the contracting parties have not agreed upon the consideration to support it. Hence, when the subject of proposed insurance has been destroyed by fire pending the question of the amount of the rate to be charged, the policies are not binding upon the proposed insurer. *Ibid.*

6. *Insurance—Policy Contracts—Cancellation—Consent — Interpretation of Statutes.*—While it takes the agreement of the minds of both parties to make a contract, it may be terminated by one of them if

INSURANCE—*Continued.*

the contract so provides; and under the provisions of our standard form of fire insurance policies, "this policy shall be canceled, at any time, at the request of the insured, etc." (Revisal, sec. 4760), the policy terminates at once, or is immediately canceled, upon the receipt by the insurer of the request of the insured to that effect, without the necessity for the consent of the insurer. *Ibid.*

7. *Same—Words and Phrases.*—Our standard form of a policy of fire insurance provides, "This policy shall be canceled at any time, at the request of the insured, or by the company giving five days notice in writing of such cancellation." Revisal, sec. 4760: *Held*, either party to the contract may cancel the policies without the consent of the other, by following the provisions of the policy applicable; and *Held further*, that the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled." *Ibid.*

8. *Insurance—Policy Contracts—Physical Cancellation—Interpretation of Statutes.*—When the insured requests cancellation of policies of fire insurance of the insurer upon the statutory or standard form (Revisal, sec. 4760), the cancellation takes effect upon the insurer's receiving the request, without formal or physical defacement of the policy. *Ibid.*

9. *Insurance, Fire—Possession of Policy—Presumptions—Rebuttal—Appeal and Error.*—The *prima facie* case of the possession by the insured of insurance policies covering loss by fire does not control on this appeal, and little importance is attached to it, as the facts herein rebut the presumption. *Ibid.*

10. *Insurance Orders—Assessments—Payments—Custom—Suspension.*—A check sent in due time, properly addressed, on a bank where the maker had ample deposit to cover it, in payment of an assessment to an insurance order in pursuance of a notice sent out by it to its members, and in accordance with the recognized and unrevoked custom of the insurance order, does not work a legal suspension of the member by reason of the remittance having failed to reach its proper destination in the required time. *Coile v. Commercial Travelers*, 104.

11. *Same—United States Mail.*—An insurance order which by an unrevoked and recognized custom has received remittances by mail for assessments due it by its members, is estopped from insisting upon the forfeiture, under the policy contract, of the rights of a member who, in conformity with this custom, had mailed a good check to cover the assessment in time for it to have reached its proper destination by due course of the mails. *Ibid.*

12. *Negligence—Transactions by Mail—Custom—Revocation.*—The regularity of the mail, a public agency, is such that it is not negligence to rely upon it as a matter of transmission, especially when it has been so used in the course of dealings between the parties, and there has been no express revocation. *Ibid.*

13. *Same—Insurance Orders—Assessments—Subsequent Payment—Reinstatement—Waiver—Estoppel.*—The plaintiff duly mailed his good check to cover an assessment made against him and its other mem-

INSURANCE—*Continued.*

bers by an insurance order, which not reaching its destination in time, worked a forfeiture as suspension under the rules of the association. While the plaintiff had been declared suspended he received an accident covered by his policy, the subject of the action. Upon being notified of his suspension, and before the accident, he applied for reinstatement: *Held*, (1), the plaintiff, under the facts of this case, was not legally suspended; (2) his application for reinstatement was not such an acknowledgment of his being lawfully suspended as would estop him from recovery; (3) the subsequent collection of this assessment and other ones by the insurance order was a waiver by it of its right to suspend the plaintiff, if otherwise it could lawfully have done so. *Ibid.*

14. *Insurance, Fire—Standard Form—Change of Title—Possession—Forfeiture—Interpretation of Statutes.*—A deed of assignment conveying all the property of insured, made after policies of fire insurance had been issued on the property, and which empowered the trustee to sell and execute deeds in fee and apply the proceeds in payment of insured's debts comes within the forfeiture clauses of the standard fire insurance policies prescribed by our statute, Revisal, sec. 4762 *et seq.*, and invalidates the policy, not being an unconditional and sole ownership of the property insured; the subject of insurance being a building on ground not owned by the insured in fee simple, and a prohibited change in the title or possession of the subject of the insurance. *Roper v. Insurance Co.*, 151.

15. *Same—Personal Property.*—A deed of assignment made subsequently to the issuance of a policy of fire insurance, including personal property of the insured covered by the policy, is a violation of the sixth clause of the standard or statutory form of policy, being such an encumbrance as is contemplated by the statute, and invalidates the policy. *Ibid.*

16. *Same—Concurrent Insurance.*—A deed of assignment for general creditors conveying property embraced in an insurance policy divests the title of the insured therein, and avoids the policy under the statutory forfeiture clause requiring that the interest of the insured be truly stated in the policy and that the insured shall not after the issuance of the policy "procure any other insurance, whether valid or not, on property covered in whole or in part by" the policy. *Ibid.*

17. *Same—Misrepresentations.*—When under a fire insurance policy the insured has violated the provisions of the policy by placing more concurrent insurance on the property than the policy permits, the policy in invalidated, in accordance with the statutory form, as a concealment or misrepresentation "in writing, or otherwise, of any material fact or circumstance concerning (the) insurance or the subject thereof." *Ibid.*

18. *Insurance, Fire—Principal and Agent—Waiver.*—An agent of a fire insurance company, whether general or local, cannot waive the requirements of a standard policy except in the manner and form prescribed by the statute. *Ibid.*

19. *Same—Adverse Interests—Imputed Knowledge.*—A trust company having acted as the agent of certain fire insurance companies, sub-

INSURANCE—*Continued.*

sequently was made the trustee in a deed of general assignment for the benefit of insured's creditors, of which it was one, which conveyed all the property of the insured covered by his policies, and the policies were continued in force by the trust companies without the knowledge or acquiescence of the insurance companies: *Held*, the acts of the trustee as agent for the companies could not be considered as binding upon the latter, or as done with their knowledge, for the interest of the agent was antagonistic to that of the companies, and could not be considered as a waiver by the companies of their rights under the policy contract. *Ibid.*

20. *Insurance — Policies — Special Clauses — "Mortgages" — Involuntary Bankrupts—Forfeitures.*—A provision in a rider attached to a policy of fire insurance, to the effect that the right of a mortgagee shall not be affected by any acts or negligence on the part of the insurer, differs from an ordinary "loss payable" clause; and where the interest of the mortgagee is insured under such a policy, and the mortgagor has made a conveyance which would avoid the policy as to him, and the mortgagee is a bankrupt, and has assigned the note and mortgage to his trustee in bankruptcy, who thus held them at the time of loss by fire, the adjudication in bankruptcy, when involuntary, does not avoid the policy as to the interests of the mortagee. *Ibid.*

21. *Insurance, Fire—Policies—Special Clauses—"Mortgagees"—Material Men—Liens—Forfeitures.*—Material men who have not perfected their lien on a building covered by a policy of insurance, and which was destroyed by fire, have no insurable interest, but only an inchoate right, and cannot recover under the New York and New Jersey standard mortgage clause, providing, "Loss or damage, if any, under this policy shall be payable" to the insured or mortgagees (trustees), as interest may appear. *Ibid.*

22. *Same.*—The New York or standard mortgage clause in a fire insurance policy does not include a lien upon the insured building of one furnishing material in its construction, and their interests are lost when the insured forfeits his rights under the policy. *Ibid.*

23. *Insurance, Fire—Policies—Standard Forms—Forfeiture—Rights of Mortgagee — Personal Property — Knowledge.*—When the assured has forfeited his right to recover damages under his fire insurance policy, containing only the usual "loss payable" clause, the rights of his mortgagee, recognized in the policy, are not superior to his, and must fall within the forfeiture clause of the contract; especially does this apply to personal property contained in the mortgage, of which the company was unaware until after the fire, causing the damage, had occured. *Ibid.*

24. *Insurance, Fire—Reinsurance—Identical Property—Reinsurer—Insurance Retained—Notice—Waiver.*—When one insurance company reinsures a risk in another company with a provision in the policy that as a condition thereof the reinsured company "is to retain an amount of insurance on the identical property therein described," or the reinsurer company would not otherwise be liable, with the further statement that the reinsured company retains a certain specified amount of insurance "on same property," and it appears from

INSURANCE—*Continued.*

the amount of insurance in force, stated on the policy, that this stipulation has not been and cannot be complied with, the reinsuring company, by accepting the policy, takes with notice, and waives the provisions thereof. *Insurance Co. v. Insurance Co.*, 485.

25. *Insurance, Fire—Reinsurance—Actual Loss—Issues—Burden of Proof.* When a fire insurance company has issued a policy on a certain structure and its contents, and has reinsured a part of the risk with another company, and, having paid a loss by fire on the property, seeks to recover on the insurance contract, it is necessary for it to show that the identical property covered by the policy sued on has been damaged od destroyed, and an issue as to the actual loss thereon should be framed, with the burden of proof on the plaintiff, except in instances of a valued policy permitted by law. *Ibid.*

26. *Insurance, Fire—Reinsurance—Actual Loss—Identical Property—Evidence.*—The plaintiff insurance company sued to recover for a loss by fire it had paid under a reinsurance contract containing a provision that it should retain a certain amount of insurance on the identical property covered by the policy, which it did not do, and which, under the surrounding circumstances, the reinsurer is found to have waived: *Held*, the evidence was properly confined to the loss sustained on the property covered by the reinsurance policy sued on, and the stipulation as to the insurance to be retained cannot be extended to property not covered by the policy, although in the same house. *Ibid.*

27. *Insurance, Fire—Proofs of Loss—Evidence and Damages.*—In an action to recover damages sustained to property which was covered by a policy of fire insurance issued by defendant company, the proofs or loss are not competent as substantive evidence of the amount of the loss or the value of the property. *Ibid.*

28. *Insurance—Employer and Employee—Indemnity—Cost of Defending Suit.*—A provision in a policy indemnifying an employer, that the company "will at its own cost defend suits in the name and behalf of the insured" for injuries to an employee covered by the policy, renders the insured liable for reasonable expense incurred by the employer in defending a suit contemplated by the policy, wherein he was successful and unable to recover the costs under an insolvent prosecution bond. *Cotton Mills v. Insurance Corporation*, 562.

29. *Insurance—Indemnity—Structural Alterations—Ordinary Alterations—Interpretation of Policy—Words and Phases.*—Where a policy of indemnity insures an employer against "damages on account of bodily injury" to an employee, "including death," and in express terms excludes injury, or death caused to "any person in connection with the making of additions to or structural alterations in, . . . any building or plant," by the term "structural alteration" is meant such as would change the physical structure of the plant, and not such as would be an "ordinary alteration or repair," and in this case it is held that it was a question for the jury as to whether the substitution of a brick chimney for iron smokestacks was only an "ordinary alteration," and not excluded by the provision of the policy. *Ibid.*

INSURANCE—*Continued.*

30. *Same—Opinion Evidence—Observation.*—Upon the question of whether the substitution of a brick chimney for iron smokestacks at the plaintiff's plant was an ordinary alteration, it was competent for a witness of long experience in such matters to testify, from his own observation, whether the alteration was an ordinary one, and not excluded from the policy of indemnity of the employer by the terms "structural alterations" therein used. *Ibid.*

31. *Insurance—Indemnity—Employer and Employee—Ordinary Alterations.*—The plaintiff contracted to have a brick chimney built to replace iron smokestacks used in its plant, and as a part of the consideration agreed to furnish sand from its own premises. While its employee was digging out the stand, it caved in on him, causing his death: *Held*, the employer was indemnified for the death of the employee under a policy wherein the insurer was made liable for the death of an employee, suffered "while within or upon the premises, etc., by reason of the operation of the trade or business including the making of repairs and such ordinary alterations as are necessary to the care of the premises and plant, and their maintenance in good condition." *Ibid.*

INTEREST. See Judgments; Usury; Appeal and Error; Torts.

INTERPRETATION OF STATUTES. See Statutes.

INTERSTATE COMMERCE. See Commerce.

INTOXICANTS.

1. *Intoxicating Liquors—Contracts—Illegal Consideration—Enforcement.*—The courts will not enforce a contract made in violation of its own laws, an checks given in payment for intoxicating liquors purchased in North Carolina in violation of our prohibition laws are not collectible in our courts. *Liquor Co. v. Johnson*, 74.

2. *Same—Conjectural Evidence—Liquor Dealers—Checks—Burden of Proof.*—When the payment of checks are resisted on the ground that they were given for the purchase of intoxicating liquors in North Carolina prohibited by our prohibition laws, the burden is on the defendants to show that they were so given, and mere conjectural circumstances or probabilities are not evidence sufficient; and no presumption of illegality arises fro mthe fact that the plaintiffs were liquor dealers, or that the defendants kept a restaurant and dealt in "soft drinks," etc., and not in intoxicants. *Ibid.*

3. *Intoxicating Liquors—"Civil Damage Laws"—Sale to Minors—Interpretation of Statutes.*—Revisal, sec. 3525, giving a right of action for exemplary damages to the father, etc., against one who by sale or gift violates the provisions of section 3524, should be construed in connection with the latter section, thus making section 2535 apply to any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit, and providing that such persons "shall be considered dealers within the meaning of this section," 3524. *Spencer v. Fisher*, 116.

4. *Same—Penal Statutes—Strict Construction—Common Law.*—Revisal, secs. 3524 and 3525, being among that class of statutes known as

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"civil damage laws," are highly penal, and give a right of action unknown to the common law, and should be strictly construed; and no one may be held liable under the statutes unless included in their terms. *Ibid.*

5. *Intoxicating Liquors—"Civil Damage Laws"—Sale to Minors—Dealers—Interpretation of Statutes.*—When a shipment of intoxicating liquor is made to a minor under circumstances that would otherwise give a right of action to the parent, etc., under the provisions of section 3525 of the Revisal construed in connection with section 3524 thereof, and a bill of lading attached to the draft for the liquqor is sent through the bank, which is paid by the minor to the cashier of the bank, who gives him the bill of lading with which he gets the liquor, the cashier, in his capacity as such, is not such a person as the statute contemplates, and an action against him, under its provisions, will not lie. *Ibid.*

6. *Intoxicating Liquors—Indictment—Attempted Sales—Verdict—Judgment.*—A charge in an indictment that the defendant did "solicit orders and proposals of purchase, etc.," for intoxicating liquors in prohibited territory, if considered as embodying a criminal accusation, can only amount to a charge of attempting to effect unlawful sales, and a conviction may not be had upon the findings of a special verdict that the defendant ordered, without profit, the liquors from beyond the State, as an accommodation to purchasers here, and did not solicit orders from any person or persons. *S. v. Allen*, 226.

7. *Same—Principal and Agent—Agent of Purchaser.*—An agent for an express and railroad company who was paid by his employers a commission upon the receipts at his office was indicted for violating the State's prohibition law by a sale of whiskey to a certain designated person, and it is *Held*, that a judgment of not guilty was properly entered upon a special verdict finding that he had ordered the whiskey from dealers beyond the State, as an accommodation for the purchaser here, without profit, or other interest in the transaction, and had received it by express and delivered it to him in the original package. *Ibid.*

8. *Intoxicating Liquors—Procurement of Sales—Agent of Vendor—Interstate Commerce—Interpretation of Statutes.*—The provisions of the Revisal, sec. 3534, that "if any one shall unlawfully procure and deliver whiskey for another he shall be deemed in law the agent of the vendor and be deemed guilty of a misdemeanor," does not apply when the whiskey has been ordered from beyond the State and the transaction is the subject of interstate commerce. It applies to procuring the whiskey by purchase from an illicit dealer in prohibited territory here. *Ibid.*

9. *Intoxicating Liquors—Place of Sale—Interpretation of Statutes—Interstate Commerce.*—The provisions of Revisal, sec. 2080, making the place of delivery of intoxicating liquors the place of sale, do not apply when the liquors are ordered from beyond the State and the subject-matter of the transaction is properly regarded as interstate commerce. *Ibid.*

10. *Intoxicating Liquors—Packages in Bulk—Distribution—Federal Law and Constitution.*—When the shipment of intoxicating liquors is the

INTOXICANTS—*Continued.*

subject of interstate commerce, and each package is addressed to its respective purchaser, the fact that they have been received in a general package and distributed, as directed, does not bring the transaction within the meaning of the Federal statute, known as the Wilson Act, which provides that upon transporting such liquors into a State or territory they shall upon arrival be subject to the laws thereof enacted in the exercise of its police powers, etc. *Ibid.*

11. *Intoxicating Liquors—Indictment—Verdict—General Verdict—Specific Findings—Judgment.*—For a person to be successfully indicted for the unlawful sale of spirituous liquors, it is necessary that there be allegation and proof of specific conduct constituting a breach of the criminal law; and when the indictment charges an attempt to make such unlawful sales, and by a special verdict it is found that the defendant "did order for everybody else who applied to him," excepting the sales specifically charged, a judgment of guilty may not be entered against him. *Ibid.*

12. *Intoxicating Liquors—Principal and Agent—Notes—Purchase Price—Actions in Pari Delicto.*—A note given in this State for the purchase price of intoxicating liquors to a nonresident dealer, where the sale is made in North Carolina in violation of our prohibition laws, cannot be enforced in our courts, the parties being *in pari delicto*. *Pfeifer v. Israel*, 409.

13. *Same—Place of Contract—Criminal Liability.*—Where the agent of a nonresident dealer in intoxicants solicits in North Carolina and effects a sale thereof here, where the purchaser executes his note for the purchase price, it is held that the contract of sale was made in North Carolina, prohibited by our laws, and not enforcible in our courts. *Semble*, the agent is subject to indictment. *Ibid.*

ISSUES. See Pleadings; Eminent Domain; Trials; Justice of the Peace.

JUDGMENTS. See Appeal and Error; Trials; Executors and Administrators.

1. *Judgments—Contingencies—Agreements—Appeal and Error—Procedure.*—In this action for damages for the alleged negligent killing of plaintiff's intestate, a certain part of the judgment ordering that plaintiff's attorneys' fees be paid by the clerk upon the parties entering into a certain written agreement, is *Held* improper and stricken out on appeal. *Speight v. R. R.*, 80.

2. *Judgments—Res Judicata—Execution—Injunction—Practice — Direct Proceedings.*—Where in proceedings in summary ejectment on final judgment entered in the Superior Court it has been adjudicated that the plaintiff in the present action was the tenant of the defendant herein, which judgment was not appealed from, the matter is *res judicata*, and the plaintiff herein, the defendant in the former action, cannot maintain his suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. *Isler v. Hart*, 499.

3. *Same—Collateral Agreement—Mortgage—Possession.*—It having been adjudicated in a former action that the plaintiff did not have title to

JUDGMENTS—*Continued.*

the lands in dispute, he sets up a collateral agreement in this action by which he was to buy the lands, and contends that he can enforce this agreement on payment of the purchase money: *Held*, an injunction should not issue to restrain an execution under the former judgment, and the plaintiff must surrender possession before bringing action. *Ibid.*

4. *Judgments—Personal Injury—Interest Allowable—Discretion of Jury.*—Interest on a judgment for damages for a personal injury from the time it is negligently caused is not allowable, even in the discretion of the jury. Interest runs from the time the judgment is rendered in such cases. *Penny v. R. R.*, 523.

5. *Judgments by Default—Nominal Damages—Inquiry as to Measure of Damages—Evidence.*—A judgment by default and inquiry for want of an answer establishes only the fact that some damages are recoverable, leaving the amount open to inquiry, with the burden on plaintiff to prove it, and the defendant may show that it is nominal only. *Graves v. Cameron*, 549.

JUDGMENTS, CONSENT. See Appeal and Error; Intoxicants; Criminal Law.

JUDICIAL KNOWLEDGE. See Appeal and Error.

JUDICIAL SALES.

Legal Proceedings — Presumptions — Sales — Deeds and Conveyances — Homestead—Excess—Debts Contracted Prior to 1868—Constitutional Law.—The presumption is in favor of the validity of judicial proceedings, and where a tract of land has been sold under a judgment on a debt contracted prior to the Constitution of 1868, and the homestead has since been laid off in a part thereof, in the absence of evidence to the contrary it will be presumed that the excess was first sold, and the proceeds being insufficient to pay the debt, the homestead was then sold, and the deed of the sheriff conveying the entire tract will be held valid. *Corey v. Fowle*, 187.

JURISDICTION. See Courts; Venue; Justice of the Peace; Parties.

JUSTICE OF THE PEACE.

1. *Bastardy—Practice.*—A motion to dismiss, in the Superior Court, an appeal from a justice of the peace, based upon the defectiveness of the justice's return, should not be allowed when it sufficiently appears therefrom to inform the court of the course of the proceedings before the justice and to enable it to proceed to the trial of the cause. If the return is incomplete, the proper motion is to require a better one from the justice. *S. v. Currie*, 276.

2. *Courts—Justices of the Peace—Docketing Appeal—Action Dismissed—Waiver.*—When an appeal from a judgment of a justice of the peace is not docketed in the Superior Court in the time prescribed by the statute, it will be dismissed unless the provision is waived by the adverse party, and an agreement which only provides for the custody of the property pending the appeal does not have the effect of a waiver of the time within which the appeal should be docketed. *Jones v. Fowler*, 354.

JUSTICE OF THE PEACE—*Continued.*

3. *Courts—Justices of the Peace—Presumptions—Jurisdiction—Motions to Dismiss—Judicial Knowledge.*—Where a judgment has been obtained in the court of a justice of the peace to recover 300 pints and half-pints of whiskey, the value stated in the summons to be less than $50, the presumption is that the judgment is valid and that the facts necessary to sustain it exist; and the Supreme Court will not assume that its value is greater than that found, upon a motion to dismiss for want of original jurisdiction in the justice's court. *Ibid.*

4. *Courts—Justices of the Peace—Goods Sold and Delivered—Verified Statement—Prima Facie Case—Interpretation of Statutes—Rebuttal.*—In an action before a justice of the peace for the purchase price of goods alleged to have been sold and delivered, the verified itemized account is made *prima facie* evidence by Revisal, sec. 1625, which may be rebutted. *Manufacturing Co., v. Sexton*, 501.

5. *Same—Evidence—Questions for Jury.*—Where a *prima facie* case is made out under Revisal, sec. 1625, in an action for goods alleged to have been sold and delivered, and the defendant introduces evidence tending to show that they had been shipped to him without his knowledge, and that when he ascertained the name of the shipper he at once notified him that the goods were subject to his order and asked disposition, it was not incumbent upon the defendant to send the goods back till he received the instruction asked for, and the evidence, if the jury finds it to be true, rebuts the *prima facie* case; and the fact in this case, that the defendant kept the goods in his store for more than a year, affected only the credibility of his evidence in its consideration by the jury. *Ibid.*

6. *Courts—Justices of the Peace—Goods Sold and Delivered—Pleadings—Denial—Issues.*—Where an action for the sale and delivery of goods is brought in a court of a justice of the peace, and the defendant admits that his clerk had the right to buy the goods, but denies the account, an issue is raised as to whether the goods had been purchased, and his liability for their payment. *Ibid.*

7. *Justice's Court—Appeal—Excusable Neglect—Recordari—Appeal and Error—Findings of Fact.*—An appeal presently lies from an order of the Superior Court granting a motion for a writ of *recordari* to a justice's court and directing that the cause be set down for trial *de novo*, and the trial judge should find and declare the facts upon which he based the order, when it is appealed from to the Supreme Court. *Hunter v. R. R.*, 503.

8. *Justice's Court—Appeal—Excusable Neglect—Appeal and Error—Meritorious Defense—Practice.*—On appeal from an order of the Superior Court allowing a writ of *recordari* to a court of a justice of the peace on the ground of excusable neglect of a party or his attorney in not perfecting his appeal from an adverse judgment therein rendered, it must be shown that the defendant had a meritorious defense, or the order appealed from will be held as reversible error. *Ibid.*

LACHES. See Appeal and Error.

LANDLORD AND TENANT. See Criminal Law, 2; Trials, 102.

1. *Lessor and Lessee—Statute of Frauds—Assignment of Lease—Time of Possession—Parol Evidence.*—Where there is a written lease of land

LANDLORD AND TENANT—*Continued.*

for five years, and the lessee assigns it in writing for the remaining term of three years, possession to be delivered on demand, parol evidence is competent to show the time the transfer was to take effect, it appearing that the demand was made at the time testified to, and the evidence being explanatory of, and not contradicting, the written agreement. *Stephens v. Midyette*, 323.

2. *Lessor and Lessee—Statute of Frauds—Assignment of Lease—Seal.*—The written assignment on a lease of lands for more than three years is not required to be under seal, by our statute, Revisal, 976. *Ibid.*

3. *Lessor and Lessee—Leases—Statute of Frauds—Written Assignment—Registration.*—The written assignment of a registered lease of lands for more than three years is not required to be registered under our statute. *Ibid.*

4. *Lessor and Lessee—Leases—Renewals—Covenants—Deeds and Conveyances—Registration—Notice.*—The renewal clause of a lease of lands for two years, "with the privilege of ten years thereafter on the same terms,"is sufficient in form and a valid part of the lease, and a covenant running with the land, and when duly recorded is binding upon the grantee, who takes with notice. *Greenville v. Gornto*, 341.

5. *Lessor and Lessee—Leases—Renewals—Covenants—Effect.*—Covenants in a lease of lands with privilege to the lessee to renew are binding upon the legal successors of the lessee as well as those of the lessor. *Ibid.*

LAPPAGE. See Deeds and Conveyances.

LEASES. See Landlord and Tenant.

LEGAL TENDER. See Deeds and Conveyances.

LEVY. See Principal and Surety; Attachment.

LIENS. See Insurance; Judgments; Deeds and Conveyances.

1. *Liens—Material Men—Interpretation of Statutes—Substantial Compliance—Turnkey Job—Time of Completion.*—While a substantial compliance with Revisal, sec. 2026, is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. *Jefferson v. Bryant*, 404.

2. *Liens—Turnkey Job—Time of Completion—Statement as to Interest.*—In this action to enforce a lien upon a building contracted to have been built for a certain total sum, the conclusion in the bill of particulars with reference to the commencement of the running of interest does not refer to the time of the completion of the building, as the plaintiff testified that it was completed at a different time. *Ibid.*

3. *Liens—Defecive Claim—Contractors—Turnkey Job—Time of Completion—Amendments—Power of Courts.*—Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and his claim for lien is defective, as filed

LIENS—*Continued.*

with the clerk, in not stating the time the house was completed, as required by the statute, Revisal, sec. 2026, it cannot be cured by amendment allowed in the Superior Court at the trial. *Ibid.*

LIMITATION OF ACTIONS. See Railroads; Wills; Deeds and Conveyances.

1. *Limitation of Actions—Adverse Possession—Color.—Held,* in this case, involving title to lands in dispute, the charge was correct that though the title passed to the defendant by his deed, the plaintiff could recover by showing title by adverse possession, not under color for twenty years, and under color for seven years. *Corey v. Fowle,* 187.

2. *Limitations of Actions—Parol Contract to Convey—Acts of Ouster—Deeds and Conveyances.*—The statute of limitations does not begin to run in favor of one who has entered into possession of lands under a parol contract to convey and who has never paid any part of the purchase price, until after some act on his part showing that he is holding it adversely to the owner; and in this case it appearing that no such act had been done prior to a recent conveyance, made within a year next before the commencement of the action, the plea is not available. *Mitchell v. Freeman,* 322.

3. *Judgments—Liens—Obligations Incurred Before 1868—Homestead—Limitation of Actions.*—A judgment obtained in 1873 on an obligation incurred prior to the Constitution of 1868, in this case as surety on a guardian bond, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations. *Blow v. Harding,* 375.

4. *Injury to Lands—Ponding Water—Limitation of Actions.*—Where the injury to lands caused by wrongfully ponding or diverting water on the lands of another is regarded as a renewing rather than a continuing trespass, the damages accruing within three years next before action brought can be recovered, though the injury may have taken its rise at a more remote period of time, unless sustained in a manner and for sufficient length of time to establish an easement. *Duval v. R. R.,* 448.

LIS PENDENS. See Creditors' Suits.

MANDAMUS.

Municipal Corporations—Mandamus—Payment Under Protest—Procedure.—One applying to the proper authorities of an incorporated town for the privilege to conduct a restaurant at a certain place therein, in accordance with a valid city ordinance requiring it, and providing for the payment of a certain sum for the privilege desired, may not test the refusal of the municipal authorities to grant the request, by acting in violation of their decision, the proper remedy being by mandamus; or, where it may be done, he should pay the tax under protest and sue for its recovery under the provisions of Revisal, sec. 2855. *S. v. Snipes,* 242.

MARRIAGE AND DIVORCE.

1. *Marriage and Divorce—Misconduct of Plaintiff.*—When the misconduct of the complaining party in an action for divorce *a mensa et thoro*

MARRIAGE AND DIVORCE—*Continued.*

was calculated to and reasonably did induce the conduct of defendant, relied upon in the action, he or she, as the case may be, cannot take advantage of his or her own wrong, and the decree of divorcement will not be granted. *Page v. Page*, 170.

2. *Same—Alimony Pendente Lite—Main Relief—Questions for Jury—Practice—Appeal and Error.*—When in an action for a divorce *a mensa et thoro* brought by the wife a motion for alimony *pendente lite* is made, and it appears that she herself is in fault, and that her own misconduct brought about the results complained of, the motion for alimony should not be granted, leaving the issues on the main relief sought for the determination of the jury at the trial; and it appearing in this case that the defendant had placed the children of the marriage with his parents for their benefit, and that the lower court had ordered that the plaintiff should see them at certain intervals, the decree is affirmed in that respect, and reversed as to the allowance of attorney's fees and alimony *pendente lite*. *Ibid.*

MARRIED WOMEN. See Acknowledgment; Husband and Wife.

MATERIAL MEN. See Insurance; Liens.

MINORS. See Intoxicants.

MISJOINDER. See Parties; Removal of Causes.

MORTGAGES. See Pledges; Trover and Conversion; Removal of Causes Equity; Insurance.

1. *Wills—Widow's Dissent—Deeds and Conveyances—Mortgages—Interests in Lands*—Where a widow is executrix and devisee under her husband's will, and brings proceedings for the allotment of her dower after the statutory period allowed therefor, the effect of her allotment does not in form or effect amount to a dissent from the will nor to any renunciation of the devisee's estate under it; and where she has executed a mortgage thereon to secure money borrowed by her, her mortgage carries to the mortgagee as security for her debt the entire estate, subject to the rights of creditors as they may exist. *Lee v. Giles*, 541.

2. *Wills—Devises—Mortgages—Notice to Creditors—Interpretation of Statutes.*—Where a widow, a devisee under her husband's will, has executed a mortgage on the lands devised more than two years, to wit, five years, etc., after the death of the testator, the mortgage is effective against creditors if taken in good faith and without notice of the insolvency of testator's estate. *Ibid.*

3. *Wills—Devises—Creditors' Bill—Lis Pendens — Mortgages —Foreclosure Sales—Purchasers.*—Where a devisee of lands has mortgaged them, and thereafter a creditors' bill is brought to subject the lands, if necessary, to debts due by the deceased, making the devisee a party, the suit amounts to notice to all interested parties as a *lis pendens*, and where a sale of the lands is decreed, the purchaser thereat acquires the equity of redemption, which the devisee has held subject to the testator's debts; and where, subject to this notice of *lis pendens*, a foreclosure sale has been decreed, without making the creditors parties, and the land has been purchased by

MORTGAGES.—*Continued.*

the mortgagee, he and those claiming under him are entitled to their mortgage lien on the lands, and are held accountable for the rents and profits during the time of their possession; for, being purchasers with constructive notice of the creditor's rights, the foreclosure sale is invalid as to them. *Ibid.*

MOTIONS. See Appeal and Error; Trials; Parties.

MOTIONS IN ARREST. See Criminal Law.

MUNICIPAL CORPORATIONS.

1. *Cities and Towns—Streets and Sidewalks—Plats and Maps—Innocent Purchasers—Notice.*—When the owner of lands in a city or town has them platted into lots, streets, alleys, etc., and sells the lots with reference to the streets, alleys, etc., according to a map made for the purpose, he thereby dedicates the streets and alleys to the use of the purchasers of the lots, who acquire their title with notice thereof, express or implied; and, under certain circumstances, it is a dedication to the public. *Green v. Miller*, 24.

2. *Cities and Towns—Streets and Sidewalks—Plats and Maps—Dedication—Innocent Purchasers—Equity — Estoppel — Notice.*—The equitable doctrine which will estop the owner of lands from denying his dedication of streets platted therein is predicated upon the idea of bad faith in him, or those claiming under him, with knowledge of the facts, or notice thereof, expressed or implied, and has no binding effect upon innocent purchasers for value of the lots upon these streets without notice, actual or constructive, of the easement, or of the rights of others therein. *Ibid.*

3. *Cities and Towns—Streets and Sidewalks—Plats and Maps—Dedication—Innocent Purchasers—Notice—Issues—Procedure—Appeal and Error.*—In an action for a mandatory injunction for the removal of an alleged obstruction in a street which had been platted off in lands, with others, by the original owner, the verdict of the jury established the facts that the land had been thus divided into streets and lots, sold to various purchasers, and, by answer to the seventh issue, under conflicting evidence, not objected to, that the defendant was a purchaser of the *locus in quo* without notice: *Held*, the verdict was controlling, and the judge of the lower court was in error in granting the injunction, thus disregarding the legal effect of the seventh issue; and even should he have thought that the defendant purchased with constructive or legal notice, the practice is that he should have set the verdict aside, and given the defendant the power of reviewing his action on appeal. *Ibid.*

4. *Cities and Towns—Sewerage—Special Benefits—Assessments—Pleadings.*—When the charter of a city expressly provides that only such property as is specially benefited by the construction of sewers shall be liable to assessments, and the owner of property who had been assessed for the purposes of laying the sewer does not allege, in his action to avoid payment, that the assessment laid against his property exceeds the benefits thereby derived by him, the corporate action of the city, being within the legislative powers conferred, is valid. *Justice v. Asheville*, 62.

MUNICIPAL CORPORATIONS—*Continued.*

5. *Cities and Towns—Sewerage—Special Benefits—Assessments—Notice —Appeal—Taxation—General Fund.*—When the Legislature has conferred upon a city the power to assess within a prescribed district the property of adjoining owners in accordance with the direct benefits received by them from the laying of the city's sewers in the streets, and gives them opportunity to challenge and review the assessments thus made, it is not necessary for the act to provide that, in making these assessments, it should be considered that the owners of the land were taxed for the purpose of sewerage in other parts of the town, the cost thereof being paid from the general fund of the city. *Asheville v. Trust Co.*, 143 N. C., cited and applied. *Ibid.*

6. *Cities and Towns—Sewerage—Assessments—Districts—Legislative Powers—Presumptions—Appeal and Error.*—A city must have laid off special districts wherein its citizens are liable to be assessed in accordance with the direct benefits received by them in constructing its sewerage system; but this may be done by the Legislature in the act authorizing it, or by the city under the power to make such improvements, and the proper exercise of such authority and the regularity of the proceedings is presumed on appeal, when the record is silent. *Ibid.*

7. *Cities and Towns—Taxation—Tax on Merchants—Graduated Tax.*— An incorporated town, having the legislative authority to impose a license tax on trades, etc., may impose it upon merchants by a flat rate of taxation uniformly made; and while a graduation of the tax, if that method is pursued, is better regulated upon a basis of a percentage of sales, yet it is legal if made upon a system of dividing the merchants roughly into a certain number of classes according to the amount of their annual sales. *Mercantile Co. v. Mount Olive*, 121.

8. *Same — Interpretation of Statutes.*—Under the provisions of section 30, chapter 201, Private Laws of 1905 (repealed in 1907, but reënacted by chapters 28, Private Laws of 1911), and section 48 of said chapter (Private Laws 1905), the town of Mount Olive is empowered to levy a license tax on merchants, graduated in certain classes according to their annual sales. *Ibid.*

9. *Cities and Towns—Police Powers—Taxation—Restaurants—Statutes— Ordinances—Constitutional Law.*—A legislative charter granted to an incorporated town authority to tax restaurants, etc., to define and abate nuisances, etc., and an ordinance passed in pursuance thereof, applying to all alike, requiring that keepers of restaurants, etc., should be licensed, and that persons desiring to engage in such business shall, before doing so, apply to the board of commissioners of the city, stating the place, etc., and pay for the privilege the sum of $25, are constitutional and valid, whether the regulations are regarded as within the police powers of the town or within its taxing power. *S. v. Snipes*, 242.

10. *Same—Mandamus—Payment Under Protest—Procedure.*—One applying to the proper authorities of an incorporated town for the privilege to conduct a restaurant at a certain place therein, in accordance with a valid city ordinance requiring it, and providing for the payment of a certain sum for the privilege desired, may not test

MUNICIPAL CORPORATIONS—*Continued.*

the refusal of the municipal authorities to grant the request, by acting in violation of their decision, the proper remedy being by mandamus; or, where it may be done, he should pay the tax under protest and sue for its recovery under the provisions of Revisal, sec. 2855. *Ibid.*

11. *Cities and Towns—Bond Issues—Necessary Expenses—Vote of the People—Constitutional Law—Injunction.*—Where the proceeds of a proposed issue of bonds of a municipality is for the payment of an accumulation of items spent for the necessary purposes of the city, and for the purposes of properly equipping and maintaining its fire department for the safety of its citizens' property, and for the repairing and keeping in proper condition its own streets, the purposes of the issue are for the city's necessary expenses, not requiring that the issue of bonds be submitted to the vote of the people to be valid; and it appearing that the constitutional requirements that the readings on separate days upon the "aye" and "no" vote have been observed, their issuance may not legally be enjoined. *Hotel Co. v. Red Springs,* 157 N. C., 137, cited and applied. *Robinson v. Goldsboro,* 668.

MURDER. See Homicide.

NECESSARY EXPENSES. See Municipal Corporations, 15.

NEGLIGENCE. See Damages; Trials; Evidence; Master and Servant; Telegraphs; Railroads; Carriers.

1. *Master and Servant—Dangerous Instrumentalities—Dynamite—Safe Place to Work — Inspection—Negligence — Evidence — Proximate Cause—Questions for Jury.*—When the master employs a servant to blast in his mine, it is his duty to make this mine as reasonably safe to work in as is practicable in such dangerous vocation; and when, in an action to recover damages for a death wrongfully inflicted therein, there is evidence tending to show that the death was caused from a "failed hole," loaded with dynamite, which should have theretofore exploded with other charged holes of like character, and the drill boss failed in his duty to have inspected the mines for such "failed holes," and, contrary to his duty, permitted the deceased to select a place for drilling which resulted in his exploding one of them, it is sufficient to be submitted to the jury upon the issue of defendant's negligence, and it is for them to find whether this negligence of the defendant was the proximate cause of the injury under the circumstances. *Cook v. Furnace Co.,* 39.

2. *Cities and Towns—Streets and Sidewalks—Negligence—Evidence—Questions for Jury.*—In an action against a city for damages for a personal injury alleged to have been negligently inflicted, there was evidence tending to show that a city's street crossed a ditch which had long since been dug by a railroad company from its right of way and kept open, with the permission of the city, for a number of years; that the city had maintained a bridge over this ditch, but had permitted it to become in disrepair, which, at the time complained of, was not more than an 8-foot plank without railing and no lights nearer than 100 yards, and had been generally used by people to walk across for more than ten years; that plaintiff, while

NEGLIGENCE—*Continued.*

attempting to cross after sundown, was thrown by the plank into the ditch and injured: *Held*, that a motion to nonsuit should not be granted. *Styron v. R. R.*, 78.

3. *Cities and Towns—Negligence—Release—Fraud—Instructions for Jury*—A release made by an ignorant and illiterate person of all demand against a city on account of a personal injury alleged to have been negligently inflicted by it, which was not read over to the injured party, who was told by the city officials she had no claim against the city, whereupon she made her mark on the release, the consideration therefor appearing to be inadequate, is sufficient evidence of fraud in its procurement to be submitted to the jury. *Ibid.*

4. *Negligence—Contributory Negligence—Children—Riding on Engine—Permission—Nonsuit—Evidence—Questions for Jury.*—Children of tender years are not held to the same degree of care as persons of maturer age upon the questions of their negligence; and where a judgment of nonsuit is entered, the evidence being construed more favorably for the plaintiff, and when there is evidence tending to show that children were accustomed to ride on the tailboard of defendant's logging steam locomotive; and that plaintiff's intestate, a child of 10 years of age, was riding upon this tailboard in front of the backing locomotive, with the permission and knowledge of defendant's engineer and fireman; that the father of the deceased, seeing the danger, shouted and unavailingly warned the fireman thereof, who was then running the engine, and the intestate, being frightened, attempted to jump from the slowly moving engine, to her death, a question for the jury is presented as to whether the defendant's negligence in not exercising the proper care to avoid the injury and death was the proximate cause thereof, of the contributory negligence of the intestate in attempting to jump from the engine under the circumstances. *Greer v. Lumber Co.*, 144.

5. *Negligence—Proximate Cause—Definition.*—The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. Proximity in point of time or space, however, is not part of the definition. *Ward v. R. R.*, 179.

6. *Negligence—Proximate Cause—Anticipated Result—Evidence.*—In order to show that the proximate cause of an injury was the negligent act complained of, it is not required that the party charged should have contemplated or even been able to anticipate the particular consequence that ensued, or the precise injuries sustained. It is sufficient if in the exercise of reasonable care he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *Ibid.*

7. *Negligence—Evidence—Mortuary Tables—Measure for Damages—Instructions.*—In an action to recover for the negligent killing of another, the life expectancy tables are allowed as an item of evidence on the issue of damages, under the rule laid down in *Mendenhall v. R. R.*, 123 N. C., 275, to ascertain their admeasurement, by finding the present value of the net pecuniary worth of the deceased,

NEGLIGENCE—*Continued.*

ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy; the rule laid down in *Watson v. R. R.*, 133 N. C., 190, is not approved. *Ibid.*

8. *Railroads—Negligence—Down on Track—Burden of Proof.*—In an action to recover damages for the negligent killing of plaintiff's intestate by a train of the defendant railroad company, while the intestate was down and helpless on the track, the burden is on the plaintiff to establish three facts: (1) That the intestate was killed by the defendant's train; (2) that the intestate was down on the track in an apparently helpless condition; (3) that the defendant, by the the exercise of ordinary care, could have discovered the intestate in time to stop the train and avoid the killing. *Draper v. R. R.*, 307.

9. *Instructions—Contributory Negligence.*—In an action for damages for a personal injury negligently inflicted by the defendant on the plaintiff while the latter was employed in operating a certain woodworking machine, there was conflicting evidence, on the issue of contributory negligence, as to whether the plaintiff put his hand in the machine while the rollers were revolving, wherein he failed to exercise reasonable care, or whether the resulting injury was caused by a defective machine. In other respects his Honor having properly followed the instruction held to be appropriate on the former appeal, his addition thereto in respect to the further evidence introduced was not error. *Bryan v. Lumber Co.*, 455.

10. *Negligence—Definition.*—Negligence is the failure to exercise ordinary care, which depends upon the circumstances of the case, and is ordinarily a question for the jury. *Anderson v. R. R.*, 462.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 3.

NEWLY DISCOVERED EVIDENCE. See Trials; Appeal and Error.

NONRESIDENT. See Trespass.

NONSUIT. See Deeds and Conveyances.

NOTES. See Usury; Bills and Notes; Intoxicants; Pledges.

NOVATION. See Bills and Notes; Trover and Conversion.

OPINION. See Evidence; Insurance.

OPTIONS. See Contracts.

OUSTER. See Deeds and Conveyances; Limitations of Actions.

PAROL CONTRACTS. See Statute of Frauds; Reformation, Rescission, and Cancellation.

PAROL EVIDENCE. See Contracts; Statute of Frauds; Trials.

PAROL TRUST. See Evidence.

PARTIES. See Ejectment; Husband and Wife; Trials; Taxation.

1. *Partition—Parties—Appeal and Error—Motions—Estoppel.*—A party to proceedings to partition lands, who was present at the sale and received his share of the purchase money, may not, after confirma-

PARTIES—*Continued.*

tion of the matters adjudicated and affirmed on appeal, by motion in the original cause, have the sale set aside as to him. *In re Wilson*, 211.

2. *Motions—Venue—Parties—Misjoinder—Division of Action—Demurrer—Jurisdiction—Practice—Interpretation of Statutes.*—A motion to change the venue of an action must be made before a demurrer to the action may be filed for misjoinder of parties (Revisal, sec. 425); and where causes of action have been improperly joined, the court may order the action to be divided upon demurrer (Revisal, sec. 476), though triable in different counties. *Cedar Works v. Lumber Co.*, 603.

PARTITION. See Ejectment; Parties.

PAYMENTS. See Insurance, 10, 13; Municipal Corporations; Vendor and Purchaser, 5, 6; Principal and Surety, 1; Escrow, 2, 3, 4.

PENALTIES.

Penalty Statutes—Fertilizers—Qui Tam Actions—Cotton-seed Meal—Branded and Tagged—Intent—"Removal"—User—Seller—Interpretation of Statutes.—Statutes should be construed to ascertain their intent and to remedy the evil, and in this *qui tam* action to recover the penalty prescribed by Revisal, sec. 3956, for the unlawful removing of cotton-seed meal in unbranded bags and without tags, as required by section 3957, these sections, construed with section 3960, are held to mean that such removal relates to those who "sell or offer for sale any cotton-seed meal without having the proper tags attached," and not the farmer, for whose protection the statutes were enacted, so as to make him liable for removing from the depot bags of cotton-seed meal, to be used under his crops, and which had been bought by and shipped to him for that purpose. *Johnson v. Carson*, 371.

PILOTS.

1. *Pilots, Licensed—Unchartered or Unnumbered Boat—Pilotage Fees—Interpretation of Statutes.*—A duly licensed pilot may recover in our courts charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the services of such boat are recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked the owner's license, there being no provision either in our statute, Revisal, sec. 4976, or in the rules of the commissioners, which would deprive him of proper charges for the services of an unnumbered or unregistered boat owned by him. *Davis v. Heide*, 476.

2. *Pilots—Commissioners of Navigation—Discretion—Scope of Powers—Court's Jurisdiction.—Semble*, that under our statute, Revisal, sec. 4976, it is within the discretion of the commissioners of navigation and pilotage as to whether they will revoke the license of a pilot who has violated their rules by using an unchartered and unnumbered boat; and the courts are without original jurisdiction to determine whether the rules of the commissioners have been violated in this regard. *Ibid.*

PILOTS—*Continued.*

3. *Same—Appeal and Error.*—In an action brought in a justice's court by a licensed pilot to recover his fees for pilotage, payment was resisted on the ground that the boat was not registered or numbered, and in the court below it was contended that the commissioners of navigation had held that another pilot, who had hailed the vessel, was entitled to the fees in the sum of $170. *Semble*, the jurisdiction of the commissioners being limited to claims of $60, it did not exist in this case. *Ibid.*

PLEADINGS. See Eminent Domain; Statute of Frauds; Venue; Deeds and Conveyances; Justice of the Peace; Executors and Administrators; Escrow; Judgments; State's Lands; Trials; Trespass; Statute of Frauds.

1. *Pleadings—Verification Sufficient—Issues—Burden of Proof.*—In this action for specific performance of a bond for title to lands, there is uncontroverted allegation in the answer that the bond had been used in a former trial, had disappeared from among the papers and after diligent search cannot be found, with a further averment that a part of the *locus in quo* was not embraced in the bond, "according to the best recollection and belief" of the defendant, the answer being duly verified: *Held*, that the form of the denial is sufficient which bases the denial upon the defendant's recollection, which is his own information, and that the issue raised was a material one, with the burden of proof on the plaintiff. *Condor v. Stallings*, 17.

2. *Master and Servant—Contributory Negligence—Pleadings—Burden of Proof—Issues—Instructions.*—When in an action for damages for the wrongful killing of plaintiff's intestate the issues of negligence and contributory negligence are presented, the latter upon the theory that the deceased met his death while acting in disobedience of the defendant's orders, as the proximate cause, requested instructions which refer this element of defense to the issue as to negligence are properly refused, as it is the duty of the defendant to plead such matters, and prove them under the issue of contributory negligence, unless it is proven by the testimony of the plaintiff. *Cook v. Furnace Co.*, 39.

3. *Courts—Probate—Issues of Fact and Law—Procedure.*—The rulings or decisions of the clerks of the court must be "transferred for trial to the next succeeding term of the Superior Court (Revisal, secs. 78, 114, 529, 717), if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Ibid.*

4. *Pleadings, How Construed—Prayers for Relief—Practice.*—A pleading is liberally construed to attain substantial justice between the parties, and if it can be seen from its general scope that a party has a couse of action, although not stated with technical accuracy, it will be sustained. *Brady v. Brady*, 324.

PLEADINGS—*Continued.*

5. *Pleadings—Issues—Waiver.*—When a party to an action involving the title to lands in dispute contends that a certain mortgage, necessary in the paper title of the adverse party, is barred by the statute of limitations, Revisal, sec. 391, subdivision 3, relating to mortgagor's ten-year possession, an objection that the same was not specially pleaded is waived when, after the conclusion of the evidence and argument, he obtains permission from the court to open the case and offer evidence tending to show that the mortgage had been kept in date by payment, thus rendering the issue appropriate and necessary. *Ferrell v. Hinton*, 348.

6. *Pleadings—Forms—Prayers for Relief—Practice—Contracts—Breach of Warranty.*—Under our practice, rights are declared and justice administered on the facts which are alleged and properly established, without reference to any particular form of statement in the pleading, or to the prayers for relief therein set out; and, in this case, it is *Held*, that the court erred in excluding the defendant's evidence tending to show his damage, by the way of counterclaim, in the breach of warranty of a contract of sale. *Manufacturing Co. v. Manufacturing Co.*, 430.

7. *Liens—Purchase Money—Pleadings—Demurrer—Fraud—Questions for Jury.*—Where A alleges as his cause of action against B, that he has conveyed to him certain standing timber for which deferred payments were to be made, and it does not appear that he has reserved the title to secure these payments; that B has conveyed to C, who has his deed recorded; and that thereafter he and B have entered into a contract whereby the latter was to cut the timber in payment at a certain price based on the stumpage, and sues out an attachment on a part of the timber B has conveyed to C, a demurrer to the complaint is good; but where fraud is alleged in the transaction between B and C, that it was with the intent to cheat and defraud the plaintiff, an issue is properly raised for the determination of the jury. *Shingle Mills v. Sanderson*, 452.

8. *Pleadings—Fraud — Defective Statement — Amendments.*—Where a debtor whose property is sought to be attached has conveyed it to his codefendant, and there is an allegation in the complaint that it was with the intent to cheat and defraud him, and that the deed was fraudulently made, while not as explicit and full as it should be, is a defective statement of a good cause of action, and may be cured by amendment. *Ibid.*

9. *Reformation—Equity—Pleadings—Evidence—Burden of Proof.*—A conveyed the timber growing on certain described lands to B, who conveyed to C. Thereafter C obtained from A a conveyance, referring for description to the first deed, granting an extension of time within which to cut and remove the timber. In a suit brought by A against C to correct the deeds for mutual mistake in the quantity of timber conveyed, the plaintiff must either show that C purchased from B with knowledge of his equity, or allege and prove that there was mutual mistake in the conveyance extending the time for cutting the timber. *Dameron v. Lumber Co.*, 495.

10. *Pleadings—Admissions—Possession at Commencement of Action—Evidence.*—Where the defendant, in an action to recover lands, admits

PLEADINGS—*Continued.*

in his answer that he was in possession of the *locus in quo* at the time of the commencement of the action, it is not necessary for plaintiff to prove it by his evidence. As to whether this is necessary when the title in controversy is independent of the possession, *Quære. Stewart v. McCormick*, 625.

PLEDGE. See Principal and Surety, 2.

1. *Pledgor and Pledgee—Pledge—Requisites—Possession.*—For the pledge of personal property as security to the payment of a note to be effectual, it is necessary that the actual or implied possession be given to the pledgee. *Milling Co. v. Stevenson*, 510.

2. *Same—Commingling of Goods—Mortgages.*—Where a written pledge of merchandise is given by a merchant for the payment of a note, and the pledgor retains the goods in his own warehouse, selling part of them from time to time and substituting like articles which have no distinctive marks of identification, it is not a sufficient segregation and the property thus commingled cannot be sold by the pledgor in payment of the obligation, whether the written instrument be regarded as a mere pledge or a chattel mortgage. *Ibid.*

3. *Notes—Pledges—Collateral—Other Indebtedness.*—A provision in a note that the collateral therewith deposited may be held by the bank to secure other indebtedness of the maker to the bank, due or to become due, is valid. *Ibid.*

4. *Notes—Pledges—Collateral—Corporations—Receivers—Distribution of Assets—Unsecured Creditors.*—Collateral deposited with a note given a bank by a corporation subsequently becoming insolvent and in a receiver's hands may be held by the bank until the note is paid, or sold by the bank, and the proceeds, if more than sufficient, should be paid over to the receiver; and the bank is then entitled to prorate with the other unsecured creditors of the corporation. *Ibid.*

POSSESSION. See Deeds and Conveyances; Wills; Pleadings.

POWERS. See Trusts; Wills.

PRACTICE. See Appeal and Error; Trials; Courts; Justice of the Peace; Pleadings; Judgments.

PRINCIPAL AND AGENT. See Corporations; Insurance; Vendor and Purchaser; Intoxicants; Carriers; Principal and Surety; Trials; Injunctions; Escrow.

1. *Contracts, Written—Parol Evidence—Fraud—Stipulations—Principal and Agent—Statute of Frauds.*—The principle that a written contract may not be contradicted or varied by parol evidence has no application when the writing itself is attacked for fraud; for if the contract is vitiated by fraud, its provisions are carried with it, and a clause in a contract of sale that it may not be varied by the representations of the sales agent cannot have any effect if the contract itself fails. Instances in which promissory representations may be false and vitiate a written contract, as where they include misrepresentations of existing facts, cited and discussed by WALKER, J. *Machine Co. v. Bullock*, 1.

PRINCIPAL AND AGENT—*Continued.*

2. *Railroads—Negligence—Principal and Agent—Scope of Agent's Authority—Declaration—Rumors—Hearsay—Evidence.*—Where a railroad company is sued for the negligent killing of plaintiff's intestate, a fireman on defendant's train, owing to an alleged defect in defendant's water spout he was required to use in filling the locomotive with water, declarations of a station hand as to the condition of the spout, in plaintiff's favor, are not within the scope of the declarant's agency, and inadmissible as hearsay; likewise, rumors in the neighborhood to that effect, the latter being of less probative force than the former. *Barnes v. R. R.*, 581.

3. *Written Contract—False Warranty—Principal and Agent.*—Where in a written contract of sale of goods made by an agent there is a provision limiting the authority of the agent to make representations respecting the goods, and the defense is established by the purchaser that the contract itself was obtained by the agent's fraud, the principal is bound by the representations made by the agent, though contradictory of the writing. *Machine Co. v. McKay*, 584.

PRINCIPAL AND SURETY.

1. *Attachment—Principal and Agent—Principal and Surety—Judgment in Former Action—Payment—Property Subject to Levy.*—A nonresident of this State sued a resident hereof in our courts upon a note secured by a chattel mortgage on personal property situated here, and in an attachment proceeding gave the required bond with an indemnity company as surety, and through its agents and attorneys, who also represented the surety company, sold the mortgaged property. In that proceeding the defendant recovered damages to the value of the property thus sold against the plaintiff therein and his surety, which was paid by the latter. The present action is on a note made by the plaintiff and defendant in the first named action, and on attachment issued against the proceeds of sale of the property therein which had been paid into court: *Held*, upon the payment of the judgment for damages in the first named action, the title to the property seized passed from the estate of the original owner to the plaintiff in the claim and delivery proceedings, who is codefendant here, and this seizure and sale having been at such defendant's suit and by his attorneys both in law and fact, the property should be considered his, subject to the rights of the present plaintiff under attachment levied, unless it is shown that the ownership has been altered or in some way affected. *Bank v. Surety Co.*, 506.

2. *Principal and Agent—Principal and Surety—Equitable Assignment—Evidence—Possession.*—Under the circumstances in this case it is held that the agents or attorneys for the nonresident defendant hold the proceeds of the sale thereunder for such nonresident defendant, and not for the indemnity company, surety in the claim and delivery proceedings, and that nothing in the evidence tends to show a pledge or equitable assignment thereof by the agents to the surety, for such required the delivery of possession, or that it was held by the agent for the surety, and the paper-writing relied on for this purpose shows, at most, that the moneys were only to be retained by the agents within the jurisdiction of our courts. *Ibid.*

PRIVY EXAMINATION. See Acknowledgment.

PROBATE. See Courts.

PUBLIC SALES. See Sales.

RAILROADS. See Easements; Eminent Domain; Corporation Commission; Evidence; Master and Servant.

2. *Railroads—Subsequent Negligence—Increased Damages—Ponding Water—Questions for Jury.*—Where a railroad company, in constructing its road, more than five years before the commencement of the action, has constructed an insufficient culvert to carry off the water, causing it to pond upon plaintiff's land to his damage, and there is further testimony that, within that period, the defendant had allowed the culvert to fill with mud and trash, stopping it up, and greatly increasing the damage to his land, the court upon the additional testimony cannot hold that the plaintiff's cause of action is barred. *Duval v. R. R.*, 448.

2. *Same—Interpretation of Statutes.*—The five-year statute of limitations, applying to damages caused to lands by a railroad company in constructing its road, is inapplicable where the injury complained of is caused by its negligent failure to keep open a culvert it had there constructed, causing further damage to lands by the ponding of water thereon, for this additional damage is a wrong of a different character than that contemplated by the statute. *Ibid.*

3. *Railroads—Negligent Construction—Damages—Ponding Water—Subsequent Negligence.*—Where a railroad company has built a culvert under its road to carry off the water, and thereafter has permitted this culvert to become stopped with mud and trash so as to cause further damage to plaintiff's lands by the ponding of water thereon, the plaintiff's cause of action comes within the principle of a renewing trespass. *Ibid.*

4. *Railroads—Master and Servant—Fellow-servant Act—Respondeat Superior—Interpretation of Statutes.*—The charge of the court applying the doctrine of *respondeat superior*, under the Fellow-servant Act, where a section hand of a railroad was negligently injured while carrying a cross-tie with a fellow-servant, and under the direction of the section-master, is approved under *Fitzgerald v. R. R.*, 141 N. C., 535. *Wells v. R. R.*, 368.

5. *Railroads—Master and Servant—Fellow-servant Act—Interpretation of Statutes.*—Where two employees of a railroad company were instructed by their superior to do certain work, requiring the use of a ladder, and a ladder which had been discarded by the company is selected from several supplied by the company, which proves defective, the others being sound, and one of the employees sustains a fall because of the defect and receives the injury complained of and sues for damages therefor, Revisal, sec. 2646, known as the Fellow-servant Act, applies, and the plaintiff is not barred of his recovery if it should be established that his fellow-servant, who was his superior, selected the ladder without using reasonable care. *Mincey v. R. R.*, 467.

RECEIVERS. See Corporations.

RESCISSION. See Reformation, Rescission, and Cancellation.

RECORDARI. See Justice of the Peace.

REFERENCE. See Deeds and Conveyances.

Reference—Exceptions—Appeal and Error—Debtor and Creditor—Agreements—Bills and Notes—Continued Liability—Novation—Practice.—In an action to recover upon a note, the defense was relied upon that under a subsequent agreement the plaintiff released the defendant from liability thereon by substituting, for a valuable consideration, another in his place. The matter was referred, report made to the court, and judgment was erroneously entered against the the plaintiff without passing upon his exceptions. The cause is remanded for the exceptions to be heard and for the trial court to ascertain whether, by the subsequent agreement, upon the facts, the defendant was released from liability on his note; and if not, the plaintiff is entitled to recover the amount found due, and costs. *Ponder v. Green*, 50.

REFORMATION, RESCISSION, AND CANCELLATION.

1. *Contracts—Vendor and Vendee—Fraud—Rescission—Notification—Rule of the Prudent Man.*—The defendant having contracted with the plaintiff for the purchase of a large number of sewing machines, induced by the fraudulent misrepresentations of the latter's agent as to exclusive territory, when the agent knew at the time it was largely occupied by another to whom he had sold like articles, it was for the jury to determine whether the defendant acted as an ordinarily prudent man would have done in not sooner notifying the plaintiff of his election to rescind the transaction, under evidence tending to show that he so notified the plaintiff when he discovered the fraud while working the territory contracted for, about eighteen days after he could probably have sold any of the machines. *Machine Co. v. Bullock*, 1.

2. *Deeds and Conveyances—Equity—Reformation—Husband and Wife—Evidence—Communications, etc.—Interpretation of Statutes.*—Where a deed made to husband and wife, upon its face, conveys lands to them as tenants in common, and it is sought to be reformed, for mutual mistake, so as to convey an estate in entirety, the wife being then dead, it is competent for a party in interest to testify to declarations of the deceased wife, made in the presence of the husband, who is still living and a party to the suit, against his interest, to which he made no denial. Revisal, sec. 1631. *Highsmith v. Page*. 355.

3. *Deeds and Conveyances—Reformation—Equity—Mutual Mistake—Innocent Purchasers—Time of Notice.*—Where a suit is brought to correct a deed to standing timber on a larger acreage of land than was intended by the parties, for mutual mistake, against one claiming to be an innocent purchaser for value, without notice, an issue is presented as to whether the defendant had notice of the plaintiff's equity at the time he bought the timber from the plaintiff's grantee, and paid for it; for if he did not have notice at that time, he acquires title to the timber embraced in the conveyance free from the equity sought to be established. *Dameron v. Lumber Co.*, 495.

4. *Same—Pleadings—Evidence—Burden of Proof.*—A conveyed the timber growing on certain described lands to B, who conveyed to C. Thereafter C obtained from A a conveyance, referring for description

REFORMATION, RESCISSION, AND CANCELLATION—*Continued.*

to the first deed, granting an extension of time within which to cut and remove the timber. In a suit brought by A against C to correct the deeds for mutual mistake in the quantity of timber conveyed, the plaintiff must either show that C purchased from B with knowledge of his equity, or allege and prove that there was mutual mistake in the conveyance extending the time for cutting the timber. *Ibid.*

5. *Deeds and Conveyances—Reformation—Equity—Mutual Mistake—Fraud.*—A deed cannot be corrected or reformed because of the mistake of one of the parties to it, but only when the mistake is mutual; or when the mistake of one party is brought about by the fraud of the other. *Ibid.*

6. *Parol Contracts—Statute of Frauds—Fraud in the Procurement—Benefits Retained—Repudiation in Part—Equity.*—Where a contract concerning an easement in lands, required by the statute of frauds to be in writing, rests in parol, and it is shown that it was procured by fraud of the party seeking to avoid it, he will not be permitted to retain the advantage he has derived under it and repudiate the other part of his agreement. *Herndon v. R. R.*, 650.

7. *Railroads—Rights of Way—Deeds and Conveyances—Fraud—Cancellation—Equity—Condemnation—Measure of Damages.*—Where a railroad company has procured a deed for its right of way from the owner of the lands by fraud, the latter is entitled to have the deed canceled, in which case the former would be left to its right of condemnation, wherein it would have to pay for all damages, which, in this case, would include those arising to the plaintiff in having his pasture divided by the roadbed, without means of passage by his cattle from one part of the plantation to the other. *Ibid.*

8. *Deeds and Conveyances—Descriptions—Former Deeds—Calls—Mistakes—Questions of Law.*—Where upon the face of a deed it appears that a mistake has been made in locating one of its calls, which is readily ascertained from the further calls and descriptions contained in the instrument, as in this case, a call for the "west" side of a swamp when it unmistakably appears that the "east" side thereof was intended, and to carry out the description as written it would be necessary to extend two lines of the boundaries, while otherwise the boundaries would be perfectly described, the courts will correct the mistake thus evidently made, as a matter of law, so as to effectuate the plain intent of the parties; and this rule will also apply where one deed refers to a former deed in the chain of title for description of the lands, so that, construed together, the mistake will be made apparent by reference to the description in the former deed. *Ipock v. Gaskins*, 673.

9. *Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Verdict—Harmless Error.*—Where in an action to recover lands a mistaken call in the deed under which a party claims as color extends his lines so as to include the *locus in quo*, and the trial judge erroneously leaves it to the determination of the jury, upon the evidence, as to whether the call was a mistake, a verdict against the claimant upon the question of adverse possession necessary to ripen his title, renders harmless the error committed by the Court. *Ibid.*

REFORMATION, RESCISSION, AND CANCELLATION—*Continued.*

10. *Deeds and Conveyances—Description—Calls—Questions of Law—Written Contracts—Parol Evidence—Equity.*—Where the court corrects, as a matter of law, an evident mistake appearing in the face of a deed to lands, it is to effectuate the intention of the parties as it appears from the language of the conveyance itself, and the rule that a written instrument may not be varied by parol evidence, and the equitable principle applicable where the instrument itself is sought to be corrected, have no application. *Ibid.*

11. *Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Color—Harmless Error.*—Where title to lands is claimed by adverse possession under a deed as color, the color of title cannot extend beyond the boundaries contained in the deed, and the land thus claimed must be located within the boundaries given; and hence, where it is evident, from the other parts of the description of the lands as contained in the deed, that a mistake has been made, so as to include the *locus in quo*, against the manifest intent of the parties, the one claiming it under color cannot go beyond the boundaries ascertained as a matter of law to be those of the land actually conveyed. *Rogers v. Mabee*, 15 N. C., 180, and *McConnell v. McConnell*, 64 N. C., cited and distinguished. *Ibid.*

REGISTRATION. See Acknowledgment; Statute of Frauds; Landlord and Tenant.

REHEARING. See Appeal and Error.

RELIGIOUS SOCIETIES.

1. *Religious Denominations—Free-Will Baptist—Independent Government—Majority Rule.*—The colored "Free-Will Baptist Church" at Pantego, like all other Baptist churches, is congregational in its church polity. Each congregation is independent in government, and a majority of its members control. *Windley v. McCliney*, 318.

2. *Same—Church Polity—Conference — Injunction — Rights of Members.* A "Free-Will Baptist Church" held its property under a deed made to its trustees in that name. The congregation of this church united with other churches in an annual conference known as "United American Free-Will Baptist," which adopted a certain discipline at one of the conferences, which was subsequently revised, but there was a division, and at the next conference those churches which had voted to reject the revision were denied a seat in the conference. Threafter the members of this church by a divided vote adopted the conference revision, whereupon the minority withdrew and chose another pastor. Subsequently the majority of the congregation of the church elected trustees for the property, and chose a pastor. It appeared that there was no difference in doctrine or denominational creeds. In an action to enjoin the majority faction from worshiping in the church building, owned by the congregation, it is *Held*, the congregation had a right to join the conference and adopt its discipline, but this did not destroy their individuality and independence as a congregation, and that neither faction had the authority to exclude the other from worshiping in the church, the ownership of the church building being in the whole membership, its use controlled under the majority rule. *Ibid.*

REMOVAL OF CAUSES. See Appeal and Error; Trespass.

Removal of Cause—Misjoinder of Actions—Rights of Defendant—Venue —Mortgages.—A plaintiff cannot deprive defendant of the right to have a local cause of action tried in the proper county, or change the venue to the prejudice of the defendant and against his will, by uniting two causes of action having different venues. This rule, however, does not apply to actions for foreclosure of mortgages. *Cedar Works v. Lumber Co.*, 603.

REVISAL.

SEC.

78. When determinative issues arise before the clerk, the cause should be transferred to next succeeding term. *Mills v. McDaniel*, 112.

114. When determinative issues arise before the clerk, the cause should be transferred to next succeeding term. *Mills v. McDaniel*, 112.

254. Denial of paternity in bastardy proceedings need not be in writing, and regularity of proceedings before a justice of the peace is presumed on appeal. *S. v. Currie*, 275.

326. An appeal from an order for a survey in processioning lands is premature. *Chadwick v. R. R.*, 209.

383. Where adverse possession of lands is shown for more than thirty years, it is presumed that claimant has had at least constructive possession before suit brought, etc. *Stewart v. McCormick*, 625.

383. This section does not apply to this case, there being no evidence of possession by the claimant of the lappage. *Mintz v. Russ*, 538.

391 (3). Relative to pleading the ten-year possession of mortgagor, it is waived when adverse party obtains permission of court to reopen case and introduce evidence to show mortgage was kept in date. *Ferrell v. Hinton*, 348.

408. A wife may sue in her own right, and her husband joined to assist her. *Sipe v. Herman*, 107.

419. Actions to annul grants for lands lying in several counties may be brought in any one of them. *Hardwood Co. v. Waldo*, 196.

419. Action for trespass *quare clausum fregit* is local, where damages are sought for cutting off the timber, and should be brought in county where the land is situated. *Cedar Works v. Lumber Co.*, 603.

423. Where nonresident plaintiff sues nonresident defendant in trover for timber cut upon land in a different county, he must show defendant had property or conducted business in that county, or cause is removable. *Cedar Works v. Lumber Co.*, 603.

425. Motion to change venue of action must be made, for misjoinder, before demurrer. *Cedar Works v. Lumber Co.*, 603.

440 (1). Service of process on resident director of foreign corporation is valid. *Menefee v. Cotton Mills*, 164.

469. Actions for damages to land for wrongful cutting of timber, and for conversion of timber, may not be united. *Cedar Works v. Lumber Co.*, 603.

476. Causes improperly joined will be divided upon demurrer, though triable in different counties. *Cedar Works v. Lumber Co.*, 603.

REVISAL—*Continued.*

SEC.

496. Where under ambiguous pleading actions for damages to land and trover for timber cut therefrom have been united, and motion to remove the cause erroneously denied, the cause will be remanded for the parties to amend or replead. *Cedar Works v. Lumber Co.*, 604.

529. When determinative issues arise before the clerk, the cause should be transferred to next succeeding term. *Mills v. McDaniel*, 112.

529. The cause should not be transferred to trial at term when it is denied that petition to condemn lands by a railroad company was made in good faith. *R. R. v. Gahagan*, 190.

591. Transcribed stenographer's notes of trial should not be made a part of the case on appeal. *Brewer v. Manufacturing Co.*, 211.

717. When determinative issues arise before the clerk, the cause should be transferred to next succeeding term. *Mills v. McDaniel*, 112.

806. Where there is evidence that a continuing trespass on land will produce injury, an injunction should be granted. *Sutton v. Sutton*, 665.

807. Where there is evidence that a continuing trespass on lands will produce injury, an injunction should be granted. *Sutton v. Sutton*, 665.

976. A written assignment of a lease of lands for more than three years need not be under seal. *Stephen v. Midyette*, 323.

980. Both parties claiming land from common source, one of them not having been in possession, the prior registered deed of the other will control. *Mintz v. Russ*, 538.

1097. In trial in Superior Court on appeal from Corporation Commission's order for two railroads to build a union depot, evidence of the effect upon a near-by town, where one of the depots is situated, is incompetent. *S. v. R. R.*, 270.

1467. If a more perfect return is required in bastardy proceedings, the court may have it sent up. *S. v. Currie*, 275.

1494. The court may have a more perfect return sent up in bastardy proceedings. *S. v. Currie*, 275.

1625. Itemized verified account of goods sold is *prima facie* evidence before a justice of the peace which may be rebutted. *Manufacturing Co. v. Sexton*, 501.

1631. To engraft a parol trust on lands claimed under the same deed, declarations of deceased grantee are objectionable. *Boney v. Boney*, 614.

1631. Where a deed made to husband and wife is sought to be reformed, declarations of deceased wife made in presence of the husband, now living, and against his interest, are competent. *Highsmith v. Page*, 355.

1707. An entry of "a parcel or tract of land vacant, unappropriated, and subject to entry," is sufficient under this section. *Cain v. Downing*, 592.

REVISAL—*Continued.*

SEC.

1709. An enterer on State's land may not plead that a former entry is void for insufficiency of description. *Cain v. Downing*, 592.

1748. Where grants to lands in several counties have been issued, suits to annul them may be brought in only one of these counties. Section 419. *Hardwood Co. v. Waldo*, 196.

2026. Where claimant contracts with owner to complete house for one sum, itemized statement of material furnished is unnecessary for purposes of lien, but failure to state time of completion cannot be cured by amendment. *Jefferson v. Bryant*, 404.

2080. This section does not apply to interstate commerce. *S. v. Allen*, 226.

2556 (5)-(6). A railroad company may condemn a right of way across the track of another such company. *R. R. v. R. R.*, 531.

2580. Issues of fact are not raised to be tried in term, by denial that petition to condemn lands by a railroad company is made in good faith. *R. R. v. Gahagan*, 190.

2588. This section, construed with section 529, raises only issue as to damages in condemnation proceedings by a railroad company. *R. R. v. Gahagan*, 190.

2646. An employee is not barred of recovery against a railroad for injuries received by the use of a defective step-ladder selected by a fellow-servant; and it is not required that the employee be engaged in the running of the trains. *Mincey v. R. R.*, 467.

2673. The courts may order a sale of property devised for religious purposes, when it otherwise would fail of its purpose. *Church v. Ange*, 314.

2855. To test the constitutionality of a license tax it may be paid under protest and suit entered for its recovery. *S. v. Snipes*, 242.

3082. Where a widow has qualified as executrix of her husband, and then dissents, the effect is to give her a life estate, free from creditors, by right of dower. *Lee v. Giles*, 541.

3138. Unless the intent otherwise appears, a devise of lands is in fee. *Jones v. Richmond*, 553.

3269. A judgment on a verdict of guilty of the offense prohibited by section 3349, a prisoner's motion to arrest will not be granted. *S. v. Savage*, 245.

3349. Upon a verdict finding the prisoner guilty of the offense prohibited by this section, judgment may not be arrested on defendant's motion. *S. v. Savage*, 245.

3406. A charge of embezzlement of lumber or money, in an action for slander, is actionable *per se*. *Beck v. Bank*, 201.

3524. Construed with this section, section 3525 gives the right of action against dealers. *Spencer v. Fisher*, 116.

3525. This section strictly construed and right of action given against dealers in intoxicants. *Spencer v. Fisher*, 116.

3534. This section does not apply to intoxicants subject to interstate commerce. *S. v. Allen*, 226.

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Sec.

3597. The penalty for removing unbranded and untagged cotton-seed meal does not apply to the user of the fertilizer. *Johnson v. Carson*, 371.

3631. It is murder in the first degree if committed in the perpetration of a robbery. *S. v. Logan*, 235.

3712a. This section, relating to usury, does not apply where equitable relief is sought. *Owens v. Wright*, 127.

3956. The penalty for removing unbranded and untagged cotton-seed meal does not apply to the user of the fertilizer. *Johnson v. Carson*, 371.

3960. The penalty for removing unbranded and untagged cotton-seed meal does not apply to the user of the fertilizer. *Johnson v. Carson*, 371.

4760. A fire insurance policy terminates upon request of insured for cancellation, without the necessity of physical defacement. *Manufacturing Co. v. Assurance Co.*, 88.

4976. An unnumbered or unregistered boat will not deprive a pilot of his fees. *Semble*, the courts are without original jurisdiction to determine whether the rules of the commissioners of navigation are reasonable. *Davis v. Heide*, 476.

SALES. See Intoxicants; Judicial Sales; Mortgages.

1. *Public Sales—Illegal Contracts—Suppression of Bidding.*—An agreement to suppress bidding at a public sales is *contra bonos mores*, and the law will not assist either party to enforce such an agreement. *Owens v. Wright*, 127.

2. *Same—Offer and Acceptance—Consideration.*—As a result of an agreement between plaintiff and defendant made at a public sale, that the former should pay the latter the amount of his bid and a certain sum of money on a note he owed him, the property was knocked down to the defendant. The plaintiff was unable to comply with his part of the agreement, whereupon the defendant made a proposition that if the plaintiff paid a certain less sum by noon of that day he should have the property, which the plaintiff accepted, and before the appointed time went to the defendant to pay the agreed sum, and found that the defendant had sold to a third party: *Held*, (1) the first agreement was unenforcible, not having been complied with, and as being *contra bonos mores;* (2) the subsequent offer and acceptance made a new and separate contract, not affected by the infirmity of the first, and is enforcible. *Ibid.*

SEWERAGE. See Municipal Corporations.

SLANDER.

1. *Slander—Infamous Offense—Actionable Per Se—Interpretation of Statutes.*—In an action to recover damages for slander, the defendant's accusation that plaintiff had embezzled lumber or money is equivalent to charging him with the commission of a felony, or infamous offense, punishable by imprisonment in the penitentiary, as in cases of larceny (Revisal, sec. 3406), and is actionable *per se*. *Beck v. Bank*, 201.

SLANDER—*Continued.*

2. *Slander—Actionable Per Se—Malice—Presumptions.*—Malice, an essential element of slander, is generally presumed where the words spoken are actionable *per se*, until the truth thereof is proved, except where the occasion is privileged or *prima facie* excuses the publication. *Ibid.*

3. *Slander—Malice—Presumptions—Evidence—Rebuttal.*—The presumption of malice, in an action to recover damages for slander, when the words spoken are actionable *per se*, may be rebutted. *Ibid.*

4. *Slander—Actionable Per Se—Evidence—Questions for Jury.*—Where, in an action for slander, the words spoken are actionable *per se*, and the evidence is conflicting, the question should be submitted to the jury, with the burden of proof on defendant to show whether the defendant uttered the slanderous words maliciously, or whether they were true, and, if so, whether he was justified or excused in doing so. *Ibid.*

STATE'S LANDS.

1. *State's Lands—Grants—Fraud—Venue—Revisal — Interpretation of Statutes—In Pari Materia.*—The various parts or sections of the Revisal of 1905 that are *in pari materia* are considered one and the same statute, and should be so construed as to determine the true intent of the Legislature, and "its clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts," and to give effect, if possible, to all of its clauses and provisions. *Hardwood Co. v. Waldo*, 196.

2. *Same—Land in Several Counties.*—While section 1748, Revisal of 1905, provides that any one claiming land under certain grants or patents, considering himself aggrieved by their issuance to any other person since the year 1776, against law or obtained by false suggestion, surprise, or fraud, may bring his action in the Superior Court of the county in which such land may be, for the purpose of having the grant repealed or vacated, etc., it should be construed in connection with section 419 of the Revisal, which provides that an action for the recovery of real property, etc., shall be tried in the county in which the subject of the action or some part thereof is situated; and when it appears, in an action for the cancellation of several grants, brought under the provisions of Revisal, sec. 1748, some of which lay in a different county from that wherein the action was brought, that the allegation of fraud and false suggestion involve one and the same transaction, affecting each and all of the grants, the subject of the litigation, it comes within the provisions of section 419, and it is unnecessary to bring a separate action in respect to the grants issued in the other county, some of the lands, the subject of the action, lying in the county wherein the action was brought. *Ibid.*

3. *State's Lands — Vague Description — Protestant's Rights. — Pleadings — Interpretation of Statutes.* — Where a protestant against an entry of State's lands seeks to show that the entry protested against is void for insufficiency of description of the lands sought to be entered, he denies the existence of the very fact which con-

STATE'S LANDS—*Continued.*

stitutes the essential basis of his protest, that the entry covers lands belonging to him, which the State had no right to grant, having parted with the title. Revisal, sec. 1709. *Cain v. Downing*, 592.

4. *State's Lands—Entry—Vagueness of Description—Valid as to State—Subsequent Entry—Survey.*—An entry on the State's vacant and unappropriated land is not void for vagueness of description of the lands entered as between the enterer and the State, and an indefinite description may be cured by a subsequent survey, the entry being valid so long as there is no subsequent entry made, which will entitle another to challenge the right of the enterer. *Ibid.*

5. *Same—Notice to Second Enterer.*—The requirement that an entry on the State's vacant and unappropriated land describe the lands entered with sufficient definiteness, is to give a second enterer notice or what lands have been entered; and as between the State and the enterer, the entry is not void for vagueness in description, for it may be cured by a subsequent survey. Hence, a second enterer may not complain of a first entry being vague in its description of the lands, when he makes his entry after a survey has been made by the first enterer sufficient in its description. *Ibid.*

6. *State's Lands—Entry—Vagueness of Description—Protestant's Title.* A protestant against an entry on the State's vacant and unappropriated lands cannot contest the entry for vagueness of the description of the land without in some way showing some right or title therein in himself, for as between the State and the enterer the entry is valid, notwithstanding the vagueness in the description. *Ibid.*

7. *State's Lands—Entry—Description—Substantial Compliance—Notice—Parol Evidence—Interpretation of Statutes.*—Where an entry on the State's lands describes the lands entered as a certain tract of land, being 200 acres near Colly Swamp, in Colly Township, and in and around Ditch Bay, adjoining the lands of D., M., O., and others, and being "a parcel or tract of land vacant, unappropriated, and subject to entry," the description is a substantial compliance with Revisal, 1707, and sufficient notice to a subsequent enterer that the lands have been previously appropriated; and it is error to exclude evidence tending to fit the lands to the description contained in the entry. *Ibid.*

STATUTES. See Insurance; Drainage Districts; Eminent Domain; Slander; Appeal and Error; Equity; Corporations; Intoxicants; Homicide; Municipal Corporations; Criminal Law; Taxation; Liens; Trusts; Penalties; Pilots; Justice of the Peace; Executors and Administrators; Deeds and Conveyances; Wills; State's Lands; Parties; Evidence; Usury.

STATUTE OF FRAUDS.

1. *Contracts, Written—Parol Evidence—Fraud—Stipulations—Principal and Agent—Statute of Frauds.*—The principle that a written contract may not be contradicted or varied by parol evidence has no application when the writing itself is attacked for fraud; for if the contract is vitiated by fraud, its provisions are carried with it, and

STATUTE OF FRAUDS—*Continued.*

a clause in a contract of sale that it may not be varied by the representations of the sales agent cannot have any effect if the contract itself falls. Instances in which promissory representations may be false and vitiate a written contract, as where they include misrepresentations of existing facts, cited and discussed by WALKER, J. *Machine Co. v. Bullock*, 1.

2. *Lessor and Lessee—Statute of Frauds—Assignment of Lease—Time of Possession—Parol Evidence.*—Where there is a written lease of land for five years, and the lessee assigns it in writing for the remaining term of three years, possession to be delivered on demand, parol evidence is competent to show the time the transfer was to take effect, it appearing that the demand was made at the time testified to, and the evidence being explanatory of, and not contradicting, the written agreement. *Stephen v. Midyette*, 323.

3. *Lessor and Lessee—Statute of Frauds—Assignment of Lease—Seal.* The written assignment on a lease of lands for more than three years is not required to be under seal, by our statute, Revisal, 976. *Ibid.*

4. *Statute of Frauds—Pleadings—Demurrer—Evidence—Objections and Exceptions.*—The statute of frauds must be pleaded, unless title is denied, and it cannot be made available by a demurrer or an objection to evidence. *Ibid.*

5. *Lessor and Lessee—Leases—Statute of Frauds—Written Assignment—Registration.*—The written assignment of a registered lease of lands for more than three years is not required to be registered under our statute. *Ibid.*

6. *Parol Contracts—Statute of Frauds—Pleadings—Evidence—Objections and Exceptions—Easements—Deeds and Conveyances—Prescription.*—A parol contract relating to land is voidable, and not void, and, when executed, not denied, and the statute of frauds not pleaded, and the evidence to prove it is not objected to, the statute requiring it to be in writing has no application. *Henderson v. R. R.*, 650.

7. *Deeds and Conveyances—Prescription—Railroads—Easements—Rights of Way—Parol Contracts—Statute of Frauds.*—Where for mutual considerations a railroad company in acquiring a right of way has entered into parol agreement with the owner to construct an underpass or cattle-run under its track for the use of the owner whose land lay on both sides of the railroad, and which has been fully executed, and subsequently the railroad company attempts to close up the runway, which plaintiff seeks to enjoin, the interest claimed by the plaintiff is an easement in the lands which cannot pass except by deed or prescription. *Ibid.*

8. *Parol Contracts—Statute of Frauds—Frauds in the Procurement—Benefits Retained—Repudiation in Part—Equity.*—Where a contract concerning an easement in lands required by the statute of frauds to be in writing, rests in parol, and it is shown that it was procured by fraud of the party seeking to avoid it, he will not be permitted to retain the advantage he has derived under it and repudiate the other part of his agreement. *Ibid.*

STATUTE OF FRAUDS—*Continued.*

9. *Same—Railroads—Easements—Principal and Agent—Ratification—Evidence—Injunction.*—The agent of a railroad company procured a deed to a right of way over the lands of the owner, and there was evidence tending to show, as a part of the consideration of the deed, that the parties had agreed by parol that the railroad should construct a siding on the lands and perpetually keep open an underpass or cattle-run under the track for the owner's convenience, and furnish wire to inclose a pasture for cattle along the right of way granted. The company furnished the wire, constructed the underpass, and subsequently attempts to fill up the underpass. In a suit seeking a permanent injunction, the defendant company pleads the statute of frauds and denies the authority of its agent to make the contract alleged. There was further evidence on plaintiff's behalf that he requested that the agreement be put in writing, was informed by the defendant's agent that it would be unnecessary, that the defendant would keep its agreement, and that, if otherwise, the laws of the State would compel it to do so, which the plaintiff, being without legal counsel, believed and acted on: *Held*, the compliance by the defendant with the terms of the parol agreement was evidence of ratification of the contract made by its agent; the plea of the statute of frauds, with the other circumstances of this case, was evidence of fraud in the procurement of the deed for the right of way, which, if established, would set it aside; and to preserve the *status quo* of the parties, a restraining order should be granted to the hearing. *Ibid.*

STENOGRAPHER'S NOTES. See Appeal and Error.

STREETS AND SIDEWALKS. See Municipal Corporations.

STREET RAILWAYS. See Carriers.

SUPERIOR COURT. See Courts.

SUPPRESSION OF BIDDING. See Sales.

TAX, LICENSE. See Highways.

TAXATION. See Municipal Corporations.

1. *Taxation—Constitutional Law — Exemptions—Religious Purposes—Rents and Profits—Interpretation of Statutes.*—Our Legislature, in accordance with the authority conferred by section 5, Article V of the Constitution, in exempting property held for charitable and religious purposes, have not extended the exemption so as to apply to property held by trustees charged with paying over to institutions of that character the rents and profits of real estate held by them for that purpose, though the "entire rents are faithfully used and applied exclusively" thereto. *Davis v. Salisbury*, 56.

2. *Same—Benevolent Societies.*—Construing together the various sections of chapter 46, Laws 1911, upon the subject of the exercise by the Legislature of the authority to exempt certain property held for religious, educational, and other purposes, it is *Held* that neither the property of churches and other religious bodies held for rent,

TAXATION—*Continued.*

nor the rent from such property, is exempt from taxation; whereas, in the case of benevolent and charitable societies, both the building used for lodge and meeting purposes and the "proceeds and profits arising from rents, leases, etc., of rooms in such buildings are exempt" when such rents are used for charitable and benevolent purposes. *Ibid.*

3. *Taxation—Constitutional Law—Exemptions—Revenue and Machinery Acts—Interpretation of Statutes.*—The Revenue and Machinery Acts of the Legislature should be construed together, and the Revenue Act of 1911, sec. 5, was not designed or intended to establish or provide for any specific exemption, but with a view of repealing former exemptions and as a general declaration of the policy of the Legislature in carrying out the permissive features of our Constitution, Art. V, sec. 5, whereas section 7 of the Machinery Act of that year expresses the particular intent of the Legislature as to the exemptions to be allowed, and should there be a conflict between the two acts, the latter will prevail. *Ibid.*

4. *Taxation—Inheritance Tax—Privilege Tax—Interpretation of Statutes Constitutional Law.*—The inheritance tax laws of 1911, from sections 6 to 21, inclusive, seem to be exact reproduction of those of 1907, and should there be a difference, the Laws of 1907 will control as to the rate and amount of tax, and those of 1911 as to the method of appraisement and collection, the same being constitutional and valid, as an excise and privilege tax on the transmission of property, and not to be regarded as a tax on the property itself. *S. v. Bridgers*, 246.

5. *Taxation—Inheritance Tax—Suits, by Whom Brought.*—Suit for the collection of the inheritance tax, under the provisions of the statute, may be brought at the instance of the clerk of the Superior Court for the proper county or by the solicitor of the district; and in certain instances collection of the tax under the usual method by distress by the sheriff or tax collector is authorized. *Ibid.*

6. *Taxation—Inheritance Tax—Clerks of Court—Appraisements.*—Under the provisions of section 15 of the inheritance tax laws of 1911, "it shall be the duty of the appraiser (the clerk of the Superior Court) as often and whenever occasion may require, to make a fair and conscionable appraisement" of the estates subject to the tax, with a further duty to assess and fix the cash value of all annuities and life estates, growing out of such estates, upon which the inheritance tax shall be immediately payable out of the estate. *Ibid.*

7. *Taxation—Inheritance Tax—Property, When Valued—Tax, When Payable.*—Under the provisions of the inheritance tax laws of 1911, while the tax may be made a personal charge in the case of vested interests, the same is also payable out of the estate, or the portion of it subject to the duty; and for the purposes of estimating the amount of the tax, the property must be valued at the time of the death of the testator or intestate, and it is assessable or payable at that time or as soon thereafter as the proper and orderly administration of the estate permits, and in any event within two years of such death whenever it is practicable to appraise the property by any of the recognized methods and to ascertain the amount of the tax due. *Ibid.*

TAXATION—*Continued.*

8. *Taxation—Inheritance Tax—Valuation of Property—Contingencies—Collection of Tax.*—Whenever the amount of the inheritance tax is not practically ascertainable by reason of contingencies affecting the value of the estate subject to the same, or by reason of changes in the succession to holders subject to different rates, or where it is sought to make a contingent legatee subject to a personal charge for the tax before he has come into the enjoyment of the estate, or where, by reason of the contingency, he may never become the owner, the imposition and collection of the tax must be postponed until the amount of the tax in the one case, or the person who may be charged with the same in the other, can be properly determined. *Ibid.*

9. *Taxation—Inheritance Tax—Whom Taxable—Contingencies—Cestui Que Trust—Interpretation of Statutes—Executors and Administrators—Interest.*—The inheritance tax is imposed on the transmission of the title to "any person or persons or to bodies corporate or politic in trust or otherwise," and on the question of confining the effect of contingencies to those which render the ascertainment of the tax presently impracticable or impossible, the *cestui que trust* is only referred to for the purpose of fixing the rate of taxation which the executor is to retain when the bequest is of money or is specific and a sale is necessary in order to obtain money to pay the tax, and said tax draws interest after two years from the death of the testator or the intestate, and is a lien on all the property subject thereto. *Ibid.*

10. *Taxation—Inheritance Tax—Vested Interests—Tax, When Payable—Apportionment—Courts—Equity.*—When life estates are vested, they are to be appraised by the clerk of the court, and the inheritance tax is payable immediately out of the estate, according to such valuation, and, under section 10 of the act, when such or lesser estates are dependent on contingencies, if the legacy is money, the tax is presently payable from the whole amount; and if not money, the same may be "apportioned by order of court, or such orders may be made as equity may require." *Ibid.*

11. *Taxation—Inheritance Tax—Courts—Funds Transferred from Jurisdiction.*—Under the inherent powers of the court and section 10 of the inheritance tax act, when the same is applicable, and especially where the fund is directed to be transferred from this jurisdiction, the court can and should make proper orders and decrees to secure the ultimate payment of the tax, either by causing a sufficient amount of the same to be invested within the jurisdiction or by requiring a bond for that purpose, renewable from time to time, as the right and justice of the cause may require. *Ibid.*

12. *Taxation—Inheritance Tax—Monetary Legacy—Strangers—Life Estate Remainders—Appraisement—Same Rate.*—When a monetary legacy is given in trust to pay one the income for life and then the principal to his children and children's children, all of whom are strangers to the testator, and subject to the same rate of taxation in each case, it is not required to estimate the value of the life estate, but the executor may retain the tax on the entire amount of the legacy in excess of $2,000, the amount of the exemption. *Ibid.*

TAXATION—*Continued.*

13. *Taxation—Inheritance Tax—Children and Grandchildren—Same Rate—Exemption.*—Where a certain fund is bequeathed to trustees, the income payable to testator's daughter for life, and at her death to his children surviving and the children of any deceased child, the legacy is entire, and the rate upon all the beneficiaries being the same, the $2,000 exemption shall be deducted and the tax on the excess presently paid. *Ibid.*

14. *Same—Devise—Intent—In Relation of Child—Same Rate.*—Section 6, chapter 46, Laws 1911, imposes a tax of ¾ of 1 per cent on the excess over $2,000 on all legacies to the lineal issue, or lineal ancestor, or brother or sister of the decedent, or where the legatee stood in the relation of child, this to be determined in the first instance by the clerk of the Superior Court; and where there was a bequest in trust for testator's daughters-in-law, who were entirely deserving, and whom the will throughout showed were held by the testator in tender regard, the income subject to the inheritance tax should be imposed at the said rate of ¾ of 1 per cent, this being the rate imposed when one stood in relation of child. *Ibid.*

15. *Taxation—Inheritance Tax—Trusts and Trustees—Power to Invest—Sale to Pay Tax.*—When the will authorized the trustee, if he deemed it best, to sell the property and convert it into money, and receive the proceeds and invest and reinvest this in the manner and as often as he saw fit, the trustee was empowered to dispose of any part of the trust fund to the amount required to pay the inheritance tax. *Ibid.*

16. *Taxation—Inheritance Tax—Trusts and Trustees—Life Estate—Remainders—Appraisement.*—Under the inheritance tax laws, Laws 1911, ch. 46, sec. 6 *et seq.*, the exemption of $2,000 obtains as to each legacy, and where a certain fund is bequeathed to a trustee, with income for life payable out of it, remainder over, the legacy is entire; and, when required, the value of the remainder is to be ascertained by appraising the value of the life estate and deducting it from the entire fund bequeathed. *Ibid.*

TELEGRAPHS.

1. *Telegraphs—Service Message—Negligence.*—Where a telegraph company received a telegram for transmission and delivery and then finds out that owing to an unavoidable occurrence it is unable to do so, it is its duty to notify the sender, and its failure in this duty is evidence of negligence. *Hoaglin v. Telegraph Co.*, 390.

2. *Telegraphs—Failure in Delivery—Negligence—Evidence—Prima Facie Case.*—Where the failure of a telegraph company to deliver a telegram which it has accepted for transmission is shown, a *prima facie* case of negligence is made out, which may be rebutted by evidence on behalf of the company showing that it had exercised due care, or was prevented from delivering it by causes over which it had no control. *Ibid.*

3. *Telegraphs—Service Messages—Unavoidable Delays—Notify Sender—Free Delivery Limits—Negligence.*—Where a telegraph company has

TELEGRAPHS—*Continued.*

accepted a message for transmission and has necessarily sent it to an intermediate station, and the operator at the latter place finds that it cannot be forwarded on account of an unavoidable accident to the line, it is his duty to send a service message to the sending office so that the sender may be notified; and where this is not done, and damages are proximately caused, the defendant cannot excuse itself from liability merely by showing that the sender lived beyond the free delivery limits, without showing that it reasonably endeavored to find him within said limits, or that he was not therein. *Ibid.*

4. *Telegraphs—Unavoidable Interruptions—Repair of Lines—Negligence—Evidence.*—While a telegraph company is not responsible for delays due to unavoidable interruptions in the working of its lines, such as those resulting from storms or atmospheric disturbances, or any other cause over which it has no control and against which, in the exercise of ordinary prudence and foresight, it was not reasonably practicable to guard, it must, under such conditions, make diligent effort to remove the obstruction and restore its line to a normal condition, so it can perform its usual functions. *Ibid.*

5. *Telegraphs—Negligence—Unavoidable Delay—Service Message—Issues—Proximate Cause—Instructions.*—Where in an action for damages against a telegraph company there is evidence of the defendant's negligence in failing to deliver a message with reasonable promptness, upon which an issue has been submitted to the jury, and there is further evidence of negligence on the part of the defendant in not sending a service message to notify the sender, and that if the sender had been so notified he could have used other means of communication which would have avoided the injury, upon which no issue was submitted, it is reversible error for the judge to charge the jury to answer the issue "Yes" if they found the service message had not been sent: (*a*) it excluded the question of proximate cause and misled the jury; (*b*) it was for the jury to decide whether other means of communication were available, the use of which would have avoided the injury, and whether the sender would have used them; (c) or whether the service message could reasonably have been delivered to the sender under the circumstances. *Ibid.*

6. *Telegraphs—Negligence—Instructions—Appeal and Error—Indivisible Verdict—New Trial—Practice.*—Where there are two elements of negligence arising in an action and blended in the issue, and the court charges the jury incorrectly as to one of them, so that this Court may not know with certainty that the jury were not influenced by the error, the verdict being indivisible, a new trial will be granted. *Ibid.*

7. *Telegraphs—Service Messages—Negligence—Separate Issues.*—Where in an action against a telegraph company two acts of negligence are alleged, with evidence tending to establish each of them, one being the negligent failure of the defendant to transmit and deliver the message and the other relating to the necessity for a service message to inform the sender that the message could not be delivered

TELEGRAPHS—*Continued.*

owing to the unavoidable interruption of the lines, the plaintiff claiming that he could satisfactorily have used other means of communication, it is better to present the two questions of negligence in separate issues. *Ibid.*

TENANTS IN COMMON. See Deeds and Conveyances.

Deeds and Conveyances—Grantee's Children—Tenants in Common.—Under a deed to lands made to a woman and her children, the grantee named, and her children living at the date of the deed, including one *in ventre sa mere*, take as tenants in common. *Cullens v. Cullens*, 344.

TENANTS AT WILL. See Trusts.

TENANTS BY THE CURTESY. See Constitutional Law.

TENDER. See Contracts.

TIMBER DEEDS. See Deeds and Conveyances.

TIMBER TREES. See Trespass.

TIME, COMPUTATION OF. See Appeal and Error.

TORTS.

Torts—Destruction of Property—Interest—Jury's Discretion.—Where a tort committed consists in the destruction of property, the jury may, in their discretion, award interest on the value of the property destroyed from the date of its destruction, in addition to the value of the property. *Harper v. R. R.*, 451.

TRESPASS. See Venue, 3; Escrow, 6.

1. *Trespass—Injunction—Indemnity Bond—Orders—Subsequent Motions—Courts—Discretion.*—Where in an action for continuous trespass upon the lands of another an injunction is sought, and upon the hearing of the motion the judge requires the defendant to give a bond indemnifying the plaintiff against damages and permits the defendant to continue to use or go upon the land for a certain purpose eight months after its giving the bond, to which order the defendant did not except, it is *Held*, that after the defendant had complied with the order and availed himself thereof for the period of time allowed, his motion, for an extension of time is directed to the discretion of the court, from which there is no appeal. *Foster v. Cafrier*, 473.

2. *Trespass on Lands—Damages—Injunction—Financial Responsibility.* A continuous trespass upon the land of another to its damage is of such a nature that the law will give injunctive relief, irrespective of the question as to whether or not the trespasser is able to respond in damages. *Ibid.*

3. *Deeds and Conveyances—Conditions Precedent—Nonperformance—Trespass.*—When one goes upon the lands of another under a deed which was only to be delivered upon his performance of a certain

TRESPASS—*Continued.*

condition, which he has failed to perform, and the deed has not therefore been delivered, he is a trespasser on the lands. *Ibid.*

4. *Trespass—Timber Trees—Severance and Removal—Personal Property Actions—Jurisdiction.*—Where timber trees are severed from the lands of the owner by a trespasser, and carried away by him, the title to the trees is still in the owner, and he is entitled to all remedies which the law affords for the recovery of any other personal property or chattels wrongfully taken or detained. *Cedar Works v. Lumber Co.*, 603.

5. *Same—Damages to Lands.*—The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass *de bonis asportatis* for the value of the trees, both of which actions are transitory, or for trespass *quare clausum fregit*, which is local, and should be brought in the county wherein the land is situated. Revisal, sec. 419. *Ibid.*

6. *Same—Causes Improperly Joined—Amendments—Practice.*—An action for damages for trespass on land for the wrongful cutting and carrying away of timber trees, and also for their conversion, which require different places of trial, cannot be joined (Revisal, sec. 469); and where, on appeal from a motion to remove the cause, the pleading is ambiguous and both actions have been united, and the motion erroneously denied, the cause will be remanded so that the parties may amend or replead. Revisal, sec. 496. *Ibid.*

7. *Trespass—Damages to Lands—Severance and Removal of Trees—Nonresident Parties—Pleadings—Amendments—Jurisdiction.*—Where a nonresident plaintiff sues to recover of a nonresident defendant the value of timber trees alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situate, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county, he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situate, that being the county wherein the cause of action arose (Revisal, sec. 423); and where this does not appear, it is proper for the court to allow an amendment to the complaint and to the affidavit upon which a motion to remove the cause is based, should the parties so desire. *Ibid.*

8. *Removal of Cause—Misjoinder of Actions—Rights of Defendant—Venue—Mortgages.*—A plaintiff cannot deprive defendant of the right to have a local cause of action tried in the proper county, or change the venue, to the prejudice of the defendant and against his will, by uniting two causes of action having different venues. This rule, however, does not apply to actions for foreclosure of mortgages. *Ibid.*

TRIALS. See Evidence.

1. *Contracts—Fraud—Rescission—Vendor and Vendee—Instructions—Evidence—Questions for Jury.*—When, as in this case, a contract for the sale of goods has been induced by fraud, the vendee has a right

TRIALS—*Continued.*

to rescind the contract and return the goods, and under the evidence, and under proper instructions from the court, the question was for the jury. *Machine Co. v. Bullock*, 1.

2. *Master and Servant—Contributory Negligence—Pleadings—Burden of Proof—Issues—Instructions.*—When in an action for damages for the wrongful killing of plaintiff's intestate the issues of negligence and contributory negligence are presented, the latter upon the theory that the deceased met his death while acting in disobedience of the defendant's orders, as the proximate cause, requested instructions which refer this element of defense to the issue as to negligence, are properly refused, as it is the duty of the defendant to plead such matters, and prove them under the issue of contributory negligence, unless it is proven by the testimony of the plaintiff. *Cook v. Furnace Co.*, 39.

3. *Evidence—Questions for Jury.*—Upon a rehearing of this case it is held that the rules of law heretofore laid down are correct; but upon reconsidering the facts, the majority of the Court hold the evidence sufficient to be submitted to the jury. *Peele v. Powell*, 50.

4. *Cities and Towns—Streets and Sidewalks—Negligence—Evidence—Questions for Jury.*—In an action against a city for damages for a personal injury alleged to have been negligently inflicted, there was evidence tending to show that a city's street crossed a ditch which had long since been dug by a railroad company from its right of way and kept open, with the permission of the city, for a number of years; that the city had maintained a bridge over this ditch, but had permitted it to become in disrepair, which, at the time complained of, was not more than an 8-foot plank without railing and no lights nearer than 100 yards, and had been generally used by people to walk across for more than ten years; that plaintiff, while attempting to cross after sundown, was thrown by the plank into the ditch and injured: *Held*, that a motion to nonsuit should not be granted. *Styron v. R. R.*, 78.

5. *Cities and Towns — Negligence — Release — Fraud — Instructions for Jury.*—A release made by an ignorant and illiterate person of all demand against a city on account of a personal injury alleged to have been negligently inflicted by it, which was not read over to the injured party, who was told by the city officials she had no claim against the city, whereupon she made her mark on the release, the consideration therefor appearing to be inadequate, is sufficient evidence of fraud in its procurement to be submitted to the jury. *Ibid.*

6. *Instructions—Construed as Whole—Objectionable in Part.*—The charge of the judge to the jury must be construed as a whole, and one part in connection with the other parts of the charge; and objectionable parts standing alone will not be held for reversible error if the entire charge is correct. *Speight v. R. R.*, 80.

7. *Instructions—Negligent Killing—Measure of Damages—Expectancy—Mortuary Tables—Earning Capacity—Evidence.*—In this action to recover damages for the alleged wrongful killing of plaintiff's intestate, the charge of the court is approved on appeal, as to the evidence of intestate's expectancy from the mortuary tables, the weight the jury should give them, and how they should consider the testimony

TRIALS—*Continued.*

of the intestate's earning capacity, illustrating his meaning from the evidence, and as to finding by deducting his expenses, etc., the net present loss his negligent killing has caused to his estate. *Ibid.*

8. *Same—Arguments to Jury—Corrections—Appeal and Error.*—In this action to recover damages for the negligent killing of plaintiff's intestate, wherein defendant's counsel argued to the jury that evidence of the intestate's negligence should be considered upon the issue as to the measure of damages, the judge, in undertaking to correct any erroneous impression made thereby, properly instructed the jury that they should not consider the negligence of the intestate under that issue, and that evidence of his conduct, character, and habits were only relevant on the question of his earning capacity, and further *Held* that the charge was not to plaintiff's prejudice. *Ibid.*

9. *Instructions—Construed as a Whole—Negligent Killing—Measure of Damages — Expectancy — Earning Capacity — Appeal and Error.* — When damages are sought for the negligent killing of plaintiff's intestate, their measure should not be determined conclusively upon his earning capacity at the time of his death; and while the charge of the judge in this case, by the use of the words, "what he was making," if taken alone, may be objectionable, it is not held for reversible error in connection with other pertinent parts of the charge, that evidence of intestate's habits, etc., was to aid the jury in determining whether he was industrious and would be continually employed; that the mortuary tables were evidence only of his expectancy, and that the jury must ascertain from all the evidence what his income would be. *Ibid.*

10. *Instructions—Negligent Killing—Illustrations by Court—Appeal and Error.*—After illustrating from the mortuary tables in evidence, and testimony as to the intestate's earning capacity, in an action to recover damages for his negligent killing, it appears that the judge carefully instructed the jury that they must not accept the figures named, as they might be incorrect, and that they were used merely as an example: *Held*, not an expression of opinion upon the evidence, and no error. *Ibid.*

11. *Instructions—Negligent Killing—Measure of Damages—Expenses—Witnesses Interested.*—Upon the issue of the measure of damages, in an action to recover for the intestate's alleged negligent killing, and to find the net loss occasioned by the wrongful death, the mother of intestate testified that he was put to no expense for his washing, for she did that for him: *Held*, it was proper for the judge to explain to the jury that the interest of this witness should be considered, and the charge, upon the evidence in this case, is approved. *Ibid.*

12. *Appeal and Error—Indemnity—Wrong Party—Action Dismissed—Reading Complaint.*—In this action against a foreign corporation and its indemnity company wherein a copy of the policy was not attached to the complaint and the reading of the latter did not disclose whether the indemnity company was a necessary party, and this could not be ascertained until the evidence was in: *Held*, the reading of the complaint against the indemnity company in the presence of the jury, and the judge afterwards dismissing the action as to it on defendant's motion, is not reversible error. *Menefee v. Cotton Mills*, 164.

TRIALS—*Continued.*

13. *Instructions—Time of Filing—Court's Discretion—Appeal and Error.*—When it appears that the trial judge has refused to accept prayers for special instructions tendered him after the commencement of the argument, and no permission to file them at that time appears to have been given, his refusal to consider the special requests is within his reasonable discretion, and his action will not be reviewed on appeal. *Craddock v. Barnes*, 142 N. C., 89, cited and approved. *Holder v. Lumber Co.*, 177.

14. *Witnesses, Expert—Hypothetical Questions—Questions for Jury—Appeal and Error.*—Hypothetical questions asked of an expert witness, a physician, in this case, as to the effect of the wound upon the plaintiff's knee alleged to have been negligently inflicted by the defendant, and the cause of the suffering alleged to have been thereby endured, are held to be proper, and not trespassing upon the province of the jury. *Ibid.*

15. *Instructions—Master and Servant—Duty of Master—Safe Tools and Appliances.*—Instructions in this case relating to the duty of the master to furnish his servant proper tools and appliances with which to do his work, are sustained, and *Mercer v. R. R.*, 154 N. C., 400, cited and applied. *Ibid.*

16. *Evidence—Nonsuit—Instructions—Appeal and Error—Practice.*—The question of the sufficiency of the evidence to submit the case to the jury can only be considered on appeal by an exception to the refusal of the trial court to grant a motion of nonsuit or to give a proper prayer for instruction to that effect. *Ibid.*

17. *Nonsuit — Negligence — Evidence — Questions for Jury — Proximate Cause.*—Upon a motion to nonsuit, the evidence of the plaintiff must be taken as true and construed in the light most favorable to him; and in an action to recover damages against a railroad company for the negligent killing of plaintiff's intestate, there was evidence tending to show that the intestate, with five others, were engaged in loading imposing stones on defendant's box car, from a wagon, each 6 or 7 feet long, 3½ feet wide, 4 inches thick, and weighing about 1,000 pounds each; that one of these stones had been placed in the car, several inches projecting from the door, and to further load this, four of the men were in the car, leaving the intestate and the driver of the wagon holding to the other stone, placed upright upon the wagon to keep it from breaking, until the stone on the car could be put in place; that while in this dangerous position, without help to brace the stone or hold the horses, it being all the intestate and driver could do to hold the stone upright, the engineer of the defendant, in shifting cars, carried the one in question off, without warning, with the four men in it, with full knowledge of the intestate's danger, keeping it for fifteen minutes, and when the car returned, the jarring of the ground caused by the moving train or the movement of the horses, caused the upright stone to be thrown on the intestate, causing his death: *Held*, the issue as to defendant's negligence was for the jury, and the doctrine of proximate cause, in *Harton v. Telephone Co.*, 141 N. C., 455, and other like cases, cited and approved. *Ward v. R. R.*, 179.

18. *Instructions—Correlative Positions—Evidence—Appeal and Error.*—*Held*, under the evidence in this case, there is no error in the man-

TRIALS—*Continued.*

ner of stating the position of the plaintiff, and the correlative position tending to sustain the defense. *Ibid.*

19. *Instructions—Verdict, Directing—Evidence, How Considered.*—When the trial judge directs a verdict against the plaintiff he is entitled to have his evidence, without regard to the defendant's contradictory evidence, considered in the light most favorable to him, as in judgments of nonsuit, for any competent evidence in his favor should be passed on by the jury. *Beck v. Bank*, 201.

20. *Evidence—Questions for Jury.*—This action, to locate the boundaries of a public square of a town, involves an issue of fact, upon which the verdict of the jury is conclusive. *S. v. Bullock*, 222.

21. *Court's Discretion—Motions—Verdict Set Aside—Appeal and Error.*—An exception to the refusal of the court to set aside a verdict as being contrary to the weight of the evidence will not be considered on appeal, as that matter is within the discretion of the trial judge. *S. v. Johnson*, 264.

22. *Railroad Commission—Union Depots—Appeal—Superior Court—Trial de Novo—Evidence—Practice.*—On appeal from an order of the Corporation Commission requiring two railroads operating in the same town to have a joint or union depot there for passengers, the trial is *de novo* by express provision of the statute and tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence may be there introduced, whether it had theretofore been introduced before the Commission or not. *S. v. R. R.*, 270.

23. *Railroads—Corporation Commission—Union Depots—Requisites of Order—Effect on Other Town—Evidence—Appeal and Error.*—Revisal, sec. 1097, empowers the Corporation Commission to direct two railroads operating in the same town to have a joint or union depot, for their passengers, when practicable, or the necessities of the case require it for the security, accommodation, and convenience of the traveling public; and in this case, wherein a union passenger depot had been ordered by the Commission at Rutherfordton, it was *Held*, reversible error for the Superior Court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values at Hamptonville, a near-by town, where the present station of one of the roads is located. *Ibid.*

24. *Motions—Nonsuit—Evidence, How Considered.*—Upon a motion to nonsuit, the evidence must be viewed in the light most favorable for the plaintiff, approving *Brittain v. Westhall*, 135 N. C., 492. *Madry v. Moore*, 295.

25. *Same—Ejectment—Defendant's Title.*—Where plaintiff and defendant both claim title to lands, by deeds from a common source, and it appears from the defendant's deeds in evidence that questions were raised for the jury as to this title to the *locus in quo*, it is error for the court to grant a motion of nonsuit upon the evidence. *Ibid.*

26. *Same—Questions for Jury.*—Both parties to this action to recover lands claiming under a common source of title, it is *Held* that the variance in the deeds in defendant's chain of title as to description,

TRIALS—*Continued.*

number of acres, etc., raised a question for the determination of the jury as to his title. *Ibid.*

27. *Deeds and Conveyances—Ejectment—Descriptions—Definite Tract—"Formerly Owned"—Words and Phrases.*—Where in an action for the possession of lands, both parties claiming from a common source of title, the first deeds in defendant's chain recite the lands as the land "formerly owned by" A., but in the deed made directly to him it is described as "the land known as the A. tract," it is *Held*, there is a difference in the designation of the lands, for the lands, as to a whole or part, may have been owned by A., while describing the land as the "A" tract at least raises a question for the determination of the jury as to whether a separate and distinct tract by that name was conveyed, it being some evidence of location. *Ibid.*

28. *Railroads—Evidence—Obstructions—Positive Evidence—Instructions.* The testimony of defendant railroad company's engineer as to whether he could discover the plaintiff's intestate down upon the track in time for him to have stopped the train under the circumstances to avoid the injury complained of, and that of plaintiff's witness in contradiction, are of the same character of evidence, and it was not an error in the court to refuse to instruct the jury that the engineer's testimony was positive and that plaintiff's witness was not positive, the only difference between the two being that the jury may consider the better opportunity of the engineer to know. *Draper v. R. R.*, 307.

29. *Railroads—Negligence—Down on Track—Evidence—Stopping Train—Ordinary Care—Questions for Jury.*—In an action to recover of a railroad company damages for negligently killing the plaintiff's intestate at night, it was admitted that it was the defendant's train that killed him; there was evidence that he was down and helpless on the track; and as to whether the defendant's engineer used ordinary care in stopping the train in time to avoid the killing, defendant's engineer testified the train could have been stopped within 200 yards, and that he discovered the object upon the track to be a man when 160 yards distant. It was also in evidence that a man standing could be seen by the aid of the electric headlight on the engine a distance of 400 or 500 yards: *Held*, it was a question for the jury to decide whether the engineer, in the exercise of ordinary care, could have discovered the object down on the track more than 200 yards away, and that he could have stopped the train in time to avoid the killing, after he had discovered it was a man. *Ibid.*

30. *Statute of Frauds—Pleadings—Demurrer—Evidence—Objections and Exceptions.*—The statute of frauds must be pleaded, unless title is denied, and it cannot be made available by a demurrer or an objection to evidence. *Stephens v. Midyette*, 323.

31. *Railroads—Master and Servant—Safe Place to Work—Colaborer—Negligence—Instructions.*—The plaintiff, a section hand, was injured while carrying a cross-tie over a ditch 3 or 4 feet deep, on the defendant railroad company's right of way, over which a single cross-tie had been placed as a bridge. There was evidence tending to show that two cross-ties should have been used for the purpose, and that stakes should have been driven into the ground at their ends to keep

TRIALS—*Continued.*

them steady; that the cross-tie over the ditch was "wobbly," and that another section hand and the plaintiff were carrying the cross-tie in question on their shoulders, and the former, in front, stepped off the improvised bridge in a negligent manner, causing the injury complained of: *Held*, (1) a motion for nonsuit was properly denied; (2) an instruction making defendant's negligence rest solely upon the steadiness of the bridge, or upon whether the colaborer did not negligently step therefrom, was properly refused. *Wells v. R. R.*, 368.

32. *Master and Servant—Negligence—Accident.*—There being evidence of negligence on the part of the section master of a railroad company in not providing a proper method for the plaintiff, engaged, when injured, in carrying cross-ties across a ditch, and while under the direction of the section master, the principle announced in *Brookshire v. Electric Co.*, 152 N. C., 669, has no application, that the master will not be responsible for an accident which he could not have anticipated—a result from an unknown cause. *Ibid.*

33. *Evidence—Hearsay—Res Inter Alios Acta.*—It is proper for the trial judge to exclude from the evidence declarations of third persons as hearsay, and also acts of the same nature which are inadmissible, as leading the court into many collateral inquiries, and which fall within the rule of *res inter alios acta. Daniel v. Dixon*, 377.

34. *Deeds and Conveyances—Mental Incapacity—Evidence, Nonexpert.*—The rule of evidence, that the mental capacity or incapacity of one whose deed is sought to be set aside for mental incapacity to make it may be testified to by nonexpert witnesses, is approved. *Ibid.*

35. *Issue Determinative—Other Issues—Harmless Error.*—In an action to set aside a deed for the mental incapacity of the grantor to make it, where such incapacity is established by the jury, any error committed in the refusal of the court to so frame and word an issue as to show whether a consideration was paid for the deed, is harmless error so far as it may affect the validity of the deed. *Ibid.*

36. *Instructions—Substantially Given—Requests, Argumentative—Appeal and Error.*—While defendant's requested instruction in this case was argumentative, and may well have been refused on that account, yet it was substantially given by the judge in his own language, free from error, without materially weakening its force, and on that account its refusal was not erroneous. *Ibid.*

37. *Instructions—Issue Determinative—Other Issues—Harmless Error.*—If in an action to set aside a deed for mental incapacity involving other issues, the answer to the issue as to the grantor's incapacity is sufficient to set the deed aside, any error committed by the trial judge in his instruction to the jury upon other issues, having no bearing upon the first, is harmless. *Ibid.*

38. *Verdict, Directing—Conflicting Evidence—Appeal and Error.*—A prayer for instruction to direct an answer to an issue upon which the evidence is conflicting should be refused. *Ibid.*

39. *Instructions—Deeds and Conveyances—Mental Incapacity.*—The charge of the court to the jury upon the issue of the mental incapacity of a grantor whose deed is sought to be set aside on that ground is approved under the authority of *In re Thorp*, 150 N. C., 487, and other like cases. *Ibid.*

TRIALS—*Continued.*

40. *Instructions Requested by Jury—Deeds and Conveyances—Issues—Mental Capacity—Appeal and Error.*—In this action to set aside a deed for mental incapacity of the grantor, undue influence, etc., after retiring to their room the jury returned and requested the court to instruct them upon the effect of their answering the first issue in the affirmative: *Held*, no error for the judge to instruct them that if the grantor did not have sufficient mental capacity the deed would be void, otherwise it would be valid, it being equivalent to an instruction that they need not answer the second, and other issues if they answered "Yes" to the first one; but if they answered it "No," they should then consider and answer the others. *Ibid.*

41. *Issues Tendered and Refused—Appeal and Error.*—An issue tendered by a party litigant which is not sufficiently broad and comprehensive to be determinative, and is embraced in an issue submitted, is properly refused. *Alford v. Moore*, 382.

42. *Issues—Admissions—Appeal and Error.*—An issue which is covered by an admission of the parties to an action is immaterial, and when tendered, its refusal is not error. *Ibid.*

43. *Instructions—Assuming Facts—Appeal and Error.*—A requested instruction which assumes any fact at issue to have been proved should be refused. *Ibid.*

44. *Issues—Rents and Profits—Ownership of Lands—Appeal and Error.*—An issue tendered as to rents and profits of lands in dispute becomes immaterial when the jury, under a correct instruction, and from the evidence, has found the title thereof to be in the adverse party against whom they are claimed. *Ibid.*

45. *Deeds and Conveyances—Agreement to Stand Seized to the Use—Life Estates—Instructions for Jury—Tenants at Will.*—A father conveyed his home to his son, and ten days thereafter received from his son a paper-writing, under which the former claims a life estate, which partly reads as follows: "In consideration of the deed to our home, I hereby state that by mutual consent and agreement my father will act as guardian, and his rulings shall be final . . . the house to be a home for my father, etc. . . . It is expressly understood that said property is not to be rented, mortgaged, or sold." This was signed by the son as the "holder of the deed." There were no words of conveyance in or seal to the instrument. Gathering the intent from the paper-writing and from the evidence in this case, it is *Held*, that a question was raised for the determination of the jury as to whether the defendant stood seized of the use of the property for the benefit of the parties named in the instrument for life, and it was error for the court to instruct the jury that the writing created a license terminable at will upon reasonable notice. *Bullock v. Bullock*, 387.

46. *Master and Servant—Assault—Evidence Conflicting—Questions for Jury.*—Where it is shown that the master's foreman went to an employee whose duty it was to run a number of knitting machines, and, acting for the master, complained of the manner in which the machines were being run, and the evidence is conflicting as to whether the employee, unprovoked, assaulted the foreman in consequence of what he said, or whether the foreman, to enforce obedience, assaulted

TRIALS—*Continued.*

the employee without provocation, the question of the master's liability for an injury therein inflicted on his servant is one for the determination of the jury. In this case the charge of the court is approved. *Fleming v. Knitting Mills*, 436.

47. *Master and Servant—Assault Upon Servant by Superior—Scope of Employment—Damages—Respondeat Superior—Evidence Conflicting—Questions for Jury.*—Where damages are sought of the master for personal injuries inflicted by the servant, and the evidence is conflicting as to whether the act complained of comes within the scope of the servant's employment or was done in the service of the employer, so that more than one inference may be drawn from it, the question of the master's liability is one for the determination of the jury. *Ibid.*

48. *Instructions—Contributory Negligence.*—In an action for damages for a personal injury negligently inflicted by the defendant on the plaintiff while the latter was employed in operating a certain woodworking machine, there was conflicting evidence, on the issue of contributory negligence, as to whether the plaintiff put his hand in the machine while the rollers were revolving, wherein he failed to exercise reasonable care, or whether the resulting injury was caused by a defective machine. In other respects his Honor having properly followed the instruction held to be appropriate on the former appeal, his addition thereto in respect to the further evidence introduced was not error. *Bryan v. Lumber Co.*, 455.

49. *Married Women—Judgments—Costs—Contracts.*—The adjudication of costs against the losing party to an action is not contractual, but the creature of statute, and therefore bears no relation to the law regulating the liability of married women under their executory contracts. *LaRoque v. Kennedy*, 459.

50. *Married Women — Judgments — Costs — Execution Against Lands.* Where a nonresident married woman has unsuccessfully prosecuted her action, and costs are taxed against her, execution may be issued on her lands situated here. *Ibid.*

51. *Notes—Fraud—Misrepresentation—Other Acts—Evidence.*—Where payment upon a note is resisted for fraud in its execution, evidence is incompetent which seeks to show that fraud had been practiced by the plaintiff in procuring similar notes from others who are not parties to the action. *Vaughan v. Exum*, 492.

52. *Motions—New Trial—Newly Discovered Evidence—Superior Courts—Same Term—Practice.*—Passing upon a motion in the Superior Court to set aside a verdict as being against the weight of the evidence or for newly discovered testimony involves the recollection by the trial judge of the testimony, the demeanor of the witnesses, and other incidents of the trial, and as these are not so strongly impressed upon the memory of the judge that he may safely act after an adjournment, the motion must be made and determined at the same term at which the trial is had. *Stilley v. Planing Mills*, 517.

53. *Carriers of Goods—Bills of Lading—Indorsements of Shortage—Burden of Proof.*—In an action against the carrier to recover for a shortage of one box in the delivery of a shipment of two boxes of

TRIALS—*Continued.*

merchandise the plaintiff introduced in evidence the carrier's bill of lading, showing the delivery of the two boxes to the carrier, whereon the agent at destination had marked "one case short": *Held*, the agent's indorsement of the shortage was within the scope of his agency, and it was for the defendant to show, by the preponderance of the evidence, that the indorsement on the bill of lading was a mistake and that the case of goods marked short was actually delivered, when that defense is relied on. *Dunie v. R. R.*, 520.

54. *Same—Prima Facie Case—Charge Construed as a Whole—Harmless Error.*—In this action to recover of the carrier a case of merchandise, marked "short" on the bill of lading, the defendant contended that this indorsement was intended for another bill of lading and unintentionally made on the one covering the shipment in suit, which it had actually delivered to the plaintiff. The court charged the jury that this entry was an admission, *prima facie*, that one case was missing, which placed the burden on the defendant to show the contrary: *Held*, the words *"prima facie"* were inaptly used, but, taken in connection with the other relevant parts of the charge, no reversible error is found. *Ibid.*

55. *Negligence—Issues—Instructions—Former Opinion—Duty of Trial Judge—Appeal and Error.*—In this case, on a former appeal, it was held by this Court that the only negligence which could be inferred from the evidence was that of defendant's conductor. Upon this appeal the evidence set out in the record is substantially the same as on the former trial, and the judge presiding submitted an issue, which was not answered by the jury, as to negligence, on the part of another of defendant's employees, its baggage-master, concerning which it was formerly decided there was no evidence. By the language of the charge the judge confused the alleged negligence of the baggage-master under the first issue with that of the conductor: *Held*, the submission of the second issue and confusing under the first issue principles of law relating to negligence on the part of the baggage-master was reversible error, and that the trial judge should have followed the decision on the former appeal. *Penny v. R. R.*, 523.

56. *Judgments—Personal Injury—Interest Allowable—Discretion of Jury.* Interest on a judgment for damages for a personal injury from the time it is negligently caused is not allowable, even in the discretion of the jury. Interest runs from the time the judgment is rendered in such cases. *Ibid.*

57. *Railroads—Condemnation—Mutual Consideration—Change of Crossing—Assessing Damages—Findings of Court—Questions for Jury.*—A railroad company having the power of condemnation across the road of another company should exercise this right with due regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience; and it appearing in this case that the defendant had a spur track or siding where the plaintiff company proposed to cross it, and that the plaintiff may reasonably be required to cross at a point beyond the end of the defendant's spur, it is *Held* that the trial court, in a reconsideration of this case, will adjudge as to the feasibility of the suggested alteration of the plain-

TRIALS—*Continued.*

tiff's route, and call in the aid of the jury if necessary, any additional cost to the plaintiff to be considered in diminution of the defendant's damages. *R. R. v. R. R.*, 531.

58. *Evidence—Instructions—Testimony of One Witness—Appeal and Error.* Where damages are sought of a railroad company for negligence in failing to supply its fireman with a proper appliance for his work, resulting in injury, and only one witness, defendant's engineer, had testified to a certain state of facts bearing thereon, a charge of the court that if the jury believed the injury occurred as one of the engineers said it did, particularizing the testimony, to answer the issue of contributory negligence "Yes," is not objectionable as singling out the evidence of one witness for the instruction, the instruction being upon the only evidence offered on that phase and pointed out to the jury by giving the name of the witness testifying thereto. *Barnes v. R. R.*, 581.

59. *Same—Fraud and Mistake—"Satisfaction Slip."*—Where the purchaser of a traction engine has established fraud in the procurement of the contract of sale sufficient to vitiate the contract, and has been induced to accept the engine, make a payment on the purchase price and give his notes for the balance thereof upon the false assurance of the seller's agent that it would accomplish certain purposes for which it was bought, and there is evidence that the purchaser signed what is called a "satisfaction slip" at the time he signed the notes, reasonably mistaking it for one of the notes, and in an action to recover upon the notes this "satisfaction slip" is relied on as a bar to the defense of fraud, and there is further evidence that the purchaser, as soon as he reasonably could find out that the engine was not as represented, notified the seller thereof and held the engine subject to his disposition, it is *Held* that it was for the jury to decide whether or not the defendant signed the "satisfaction slip" under a mistake, and if he did, it would not bar his right of rescission upon the ground of fraud in the purchase; and *Held further*, that the "satisfaction slip" relied on in this case only amounted to an expression that the defendant was pleased with his purchase before he reasonably could have discovered its worthless character. *Ibid.*

60. *Trespass—Damages—Causes Improperly Joined—Amendments—Practice.*—An action for damage for trespass on land for the wrongful cutting and carrying away of timber trees, and also for their conversion, which require different places of trial, cannot be joined (Revisal, sec. 469); and where on appeal from a motion to remove the case, the pleading is ambiguous and both actions have been united, and the motion erroneously denied, the cause will be remanded so that the parties may amend or replead. Revisal, sec. 496. *Cedar Works v. Lumber Co.*, 603.

61. *Trespass—Damages to Lands—Severance and Removal of Trees—Nonresident Parties—Pleadings—Amendments—Jurisdiction.*—Where a nonresident plaintiff sues to recover of a nonresident defendant the value of timber trees alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county,

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he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situate, that being the county wherein the cause of action arose (Revisal, sec. 423); and where this does not appear, it is proper for the court to allow an amendment to the complaint and to the affidavit upon which a motion to remove the cause is based, should the parties so desire. *Ibid.*

62. *Motions—Venue—Parties—Misjoinder—Division of Action—Demurrer—Jurisdiction—Practice—Interpretation of Statutes.*—A motion to change the venue of an action must be made before a demurrer to the action may be filed for misjoinder of parties (Revisal, sec. 425); and where causes of action have been improperly joined, the court may order the action to be divided upon demurrer (Revisal, sec. 476), though triable in different counties. *Ibid.*

63. *Evidence—Depositions—Agreement of Counsel—Objections Taken at Trial—Practice.*—Where the counsel for both parties to the action have agreed that it may be done, the trial judge may pass upon, at the trial, objections to evidence contained in depositions which had been introduced. *Boney v. Boney*, 614.

64. *Deeds and Conveyances—Registration—Vested Rights—Instructions.*—The plaintiff claimed title to the lands in dispute under a grant from the State and mesne conveyances, excluding 200 acres as being owned by the defendant. The defendant introduced in his chain of title a deed made in 1818, registered in 1912, purporting to convey five tracts of the land by separate descriptions, aggregating 335 acres: *Held*, it was competent for the defendant to show such possession as ripened his title under the description of the lands in the deed of 1818, as color, and it was error for the court to instruct the jury that if the land claimed by the defendant was embraced in those described in the plaintiff's prior grant, he could not recover. *Gore v. McPherson*, 638.

65. *Same—Evidence.*—In this case, title to the lands in controversy was admittedly out of the State, and the defendant claimed under a deed made in 1818 as color of title, which was registered in 1912, under authority of the statute: *Held*, upon the question of holding adverse possession under this deed, it was competent for him to describe the lines of the deed with reference to the lands, saying there were chops and blazes on them; that he had lived thereon, for 65 years, and had planted it in corn and cotton, etc., and he and his father had been in possession to the lines he had described, etc.; and *Held further*, the evidence was competent also to show title without "color." *Ibid.*

66. *Carriers—Assault on Passenger—Damages—Justification of Conductor—Evidence.*—In an action to recover damages of a railroad company for an assault upon the plaintiff, a passenger, as he was leaving the train, there was evidence tending to show, and *per contra*, that the plaintiff's conduct on the train was improper; that he did not give his ticket to the conductor, who required him to pay his cash fare, whereupon the plaintiff threatened the conductor when he reached his destination; that passengers warned the conductor to look out for the plaintiff at his destination, that he was armed with a pistol;

and that the conductor had other employees of the road present at the steps of the car at the station where passengers were alighting; that as plaintiff was getting off the train, with a bundle under his arm, he was seized by the other employees and searched by the conductor for a weapon, which he failed to find; that the manner of the search made by the conductor was by passing his hands over the plaintiff's clothes, gently slapping the pockets; that after the plaintiff was released he assaulted the conductor, resulting in being knocked down by him, and for which assault the plaintiff seeks to recover the damages alleged; it is *Held*, that an instruction that the jury find for the plaintiff if they believe the evidence is erroneous, for it was a question for the jury to determine, in view of the facts as they reasonably appeared to the conductor, whether he was justified in seizing and searching the plaintiff as he was alighting from the train. *Brown v. R. R.*, 573.

67. *Verdict, Directing—Evidence, How Considered—Defendant's Rights—Contradictory Evidence—Negligence—Evidence—Appeal and Error.* Where the trial judge directs the jury to find for the plaintiff if they believe the evidence, the whole evidence should be considered in the light most favorable to the defendant; and though it may appear from the examination, in part, of defendant's own witnesses, that the instruction may have been correct, it will be held for error if taking the evidence as a whole there was sufficient to constitute the defense relied on by him. *Ibid.*

68. *Contracts—Possession—Estoppel—Evidence.*—In an action to recover a tract of land it is competent for the plaintiff to show, as to whether the defendant entered the possession of the lands under an agreement with him and in subordination to his title, that when he moved his residence therefrom and to another county the defendant or his agent promised to take charge of the land and look after it in his absence, and to pay taxes, which he was to repay on being notified; that defendant agreed to list the taxes in the plaintiff's name; that defendant was to receive the rents to be applied on an account due him by plaintiff; that some three years ago defendant asked plaintiff to sell him the land. *Nance v. Rourk*, 656.

69. *Nonsuit—Evidence, How Construed.*—In this action to recover a tract of land there was evidence tending to show, and *per contra*, that the defendant entered upon the lands under an agreement to hold the same for the plaintiff, and in subordination to his title; that the defendant had never surrendered or offered to surrender the possession to the plaintiff, and plaintiff had made no demand therefor until he brought his suit: *Held*, under the principle that on a motion to nonsuit upon the evidence the evidence must be viewed in the light most favorable for the plaintiff, the motion was erroneously granted. *Ibid.*

70. *Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Verdict—Harmless Error.*—Where in an action to recover lands a mistaken call in the deed under which a party claims as color extends his lines so as to include the *locus in quo*, and the trial judge erroneously leaves it to the determination of the jury, upon the evidence, as to whether the call was a mistake, a verdict against the

TRIALS—*Continued.*

claimant upon the question of adverse possession, necessary to ripen his title, renders harmless the error committed by the court. *Ipock v. Gaskins*, 673.

71. *Deeds and Conveyances—Description—Calls—Mistake—Questions of Law—Color—Harmless Error.*—Where title to lands is claimed by adverse possession under a deed as color, the color of title cannot extend beyond the boundaries contained in the deed, and the land thus claimed must be located within the boundaries given; and hence, where it is evident, from the other parts of the description of the lands as contained in the deed, that a mistake has been made, so as to include the *locus in quo*, against the manifest intent of the parties, the one claiming it under color cannot go beyond the boundaries ascertained as a matter of law to be those of the land actually conveyed. *Rogers v. Mabee*, 15 N. C., 180, and *McConnell v. McConnell*, 64 N. C., 344, cited and distinguished. *Ibid.*

TROVER OR CONVERSION.

Judgment by Default—Action of Conversion—Mortgages—Novation.—Where damages are sought for the conversion of a mule sold under a registered chattel mortgage, and judgment by default has been obtained, it is competent for the defendant to show that the mortgagee has since taken from the mortgagor other security and had canceled the mortgage of record, this transaction amounting to a novation of the mortgage debt, which would operate as a discharge to the defendant from any obligation he owed the plaintiff by reason of the latter's lien, to the full value of the mortgaged mule. *Graves v. Cameron*, 549.

TRUSTS. See Corporations, 1; Taxation, 10, 16, 17; Wills, 8, 10.

1. *Equity—Charitable Uses—Failure of Use—Unforeseen Events—Devises Powers of Sale.*—Courts of equity have jurisdiction to sell property devised for charitable uses where, on account of changed condition, the charity would fail or its usefulness would be materially impaired without a sale. *Church v. Ange*, 314.

2. *Trusts and Trustees—Mortgages—Transactions—Fraud—Presumptions—Rebuttal—Burden of Proof.*—The presumption of fraud arising from a transaction between a mortgagor and mortgagee whereby the latter has the former to reconvey the mortgaged lands, disappears when it is shown, with the burden on the mortgagee, that the transaction was fair and honest, free from undue influence, and that the mortgagee assented thereto at the request of the mortgagor, and did not use his power and position to drive an unfair bargain. *Alford v. Moore*, 382.

3. *Deeds and Conveyances—Agreement to Stand Seized to the Use—Life Estates—Instructions for Jury—Tenants at Will.*—A father conveyed his home to his son, and ten days thereafter received from his son a paper-writing, under which the former claims a life estate which partly reads as follows: "In consideration of the deed to our home, I hereby state that by mutual consent and agreement my father will act as guardian, and his rulings shall be final . . . the house to be a home for my father, etc. . . . It is expressly understood that said property is not to be rented, mortgaged, or sold." This

TRUSTS—*Continued.*

was signed by the son as the "holder of the deed." There were no words of conveyance in or seal to the instrument. Gathering the intent from the paper-writing and from the evidence in this case, it is *Held*, that a question was raised for the determination of the jury as to whether the defendant stood seized of the use of the property for the benefit of the parties named in the instrument for life, and it was error for the court to instruct the jury that the writing created a license terminable at will upon reasonable notice. *Bullock v. Bullock*, 387.

UNDERTAKING. See Ejectment.

UNITED STATES COURT. See Courts, 5.

USURY.

1. *Usury—Renewal Notes—Interest Charged—Principal—Credits—Interpretation of Statutes.*—The character of an instrument tainted with usury is not changed by renewals; and interest on the original note being forfeited by the illegal rate charged, any payment of money as interest made on the renewals should be credited upon the principal sum of the debt, which, under such circumstances, amounts to the loan of money without interest. *Ervin v. Bank*, 42.

2. *Usury—Interest Charged—Forfeiture—Interpretation of Statutes.* The full amount of the interest charged on an usurious instrument is forfeited under our statute, and not the difference between the usurious and the legal rate. *Ibid.*

3. *Usury—Interest Charged—Forfeiture—Pleadings—Appeal and Error.* It appearing from the referee's report, in this case, that a certain item of interest arising under an usurious contract was charged at the legal rate, and that no claim was made otherwise in the pleadings, it was error for the trial judge to overrule the referee, and to deduct double the amount of this item from the principal sum of the debt. *Ibid.*

4. *Usury.*—The question in this case of double the amount of interest paid under an usurious contract controlled by the decision of *Ervin v. Bank, ante*, 42. *Williams v. Bank*, 49.

5. *Usury—Equity.*—A debtor seeking the aid of a court of equity will have the usurious element eliminated from his debt only upon his paying the principal and legal rate of interest, the only forfeiture enforcible against the creditor being the excess of the legal rate. *Owens v. Wright*, 127.

6. *Same—Interpretation of Statutes.*—Our usury statute, Revisal, 3712a, does not affect the equitable principles relating to obligations concerning which the debtor invokes the equitable jurisdiction of the courts, as, in this case, injunctive relief against foreclosure of the security, and an inquiry into the status of the debt on account of the usurious charge of interest thereon. *Ibid.*

7. *Same—Mortgages.*—A mortgage debtor sought the equitable relief by injunction against the foreclosure of a mortgage given to secure his note tainted by usury, and asked that the debt be inquired into on that account. The mortgaged property was sold, and after paying

USURY—*Continued.*

off prior encumbrances, a certain amount of money was available as a credit on the plaintiff's indebtedness, which payment was resisted by the plaintiff on the ground that, under our statute, Revisal, 3712a, the interest and penalty were forfeited, and the amount was therefore not due: *Held*, (1) the plaintiff having sought equitable relief, must do equity, and was chargeable with the principal of his debt and the legal rate of interest thereon; (2) the statute had no application in administering the equities between the parties. *Ibid.*

8. *Usury—Release—New Debt—Interest—Right of Borrower.*—In an action to recover upon an usurious contract under our statute, usury in a certain sum was alleged, and upon reference it was ascertained that usury in a certain lesser sum had been received, and that the parties had come to an agreement whereby the lender was released from liability on account of the usurious transaction, being denominated in the release as "all amounts paid in excess of the legal rate of interest": *Held*, the borrower had the right to release the lender from liability on the usurious contract, and his release freed the original contract from the taint of usury, thereby making a new principal of indebtedness, bearing in the legal rate of interest. *Beck v. Bank*, 201.

VENDOR AND PURCHASER. See Contracts.

1. *Contracts—Fraud—Rescission—Vendor and Vendee—Instructions—Evidence—Questions for Jury.*—When, as in this case, contract for the sale of goods has been induced by fraud, the vendee has a right to rescind the contract and return the goods, and under the evidence, and under proper instructions from the court, the question was for the jury. *Machine Co. v. Bullock*, 1.

2. *Vendor and Vendee—Cotton Seed—"Car-load"—Words and Phrases—Questions for Jury.*—Where the buyer of cotton seed in car-load lots refuses a part of the shipment upon the ground that the seller had overloaded the car in order to get the contract price, upon a declining market, and there was no specification as to the quantity or number of pounds to be shipped as a car-load, and the evidence is conflicting as to the number of pounds meant by a "car-load," the question was properly left to the jury. *Layton v. Manufacturing Co.*, 482.

3. *Vendor and Vendee—Contracts—Fraud—False Representations—Intent—Knowledge.*—In this action upon a note given in the purchase of a stallion, wherein the defense of fraudulent misrepresentation is set up as to the value of the animal, or qualifications affecting the value, the charge of the court is not erroneous that the law does not deem it a fraud or false pretense for a seller of goods to puff his wares, etc.; but it would be otherwise if the representations of value were made as an inducement to the other party to enter the contract with the intent he should rely on them, which were false to the knowledge of the seller and relied on by the purchaser, who acted without knowledge. *Vaughan v. Exum*, 492.

VENUE. See State's Lands, 1; Parties 2; Removal of Causes.

1. *Actions—Transitory and Local—Distinction.*—Actions are transitory when the transactions on which they are based might take place

USURY—*Continued.*

anywhere, and are local when they could not occur except in some particular place, the distinction being in the nature of the subject of the injury, and not in the means used, or the place at which the cause of action arose. *Brady v. Brady*, 324

2. *Actions—Realty — Severed Trees—Personalty — Courts — Jurisdiction.* When the cause of action is for a certain sum of money, the proceeds of sale of timber, in the hands of one who is within the jurisdiction of our courts, which had been cut from lands claimed by the plaintiff located in another State, and there is nothing in the complaint which would entitle him to recover, here or elsewhere, damages for injury to the lands, the action is transitory, and may be maintained in our courts. *Ibid.*

3. *Same—Pleadings—Trespass—Conversion—Election.*—The owner of lands from which trees growing thereon had been wrongfully cut by another, and thus severed from the realty, may elect to sue for the recovery of damages to the land, but he must allege trespass, or he may waive the trespass, consider the trees severed as personalty, and sue for the wrongful conversion or wrongful carrying away of the trees, and recover their value. *Ibid.*

4. *Same—Code Practice—Forms of Action.*—The owner of lands situated in our jurisdiction may waive his right to an action *quare clausum fregit* and bring his action here to recover the proceeds of the sale of trees which had been severed and converted here, under our Code system, which abolishes forms of action, and, looking to the substance, requires only a simple, concise statement of the facts, and affords the party the relief to which he is entitled thereon. *Ibid.*

VERDICT. See Trials; Intoxicants; Criminal Law.

VERIFICATION. See Pleadings.

WAIVER. See Insurance; Trials; Pleadings; Justice of the Peace; Contracts; Deeds and Conveyances.

WILLS.

1. *Wills—Interpretation—Rectory—Trusts and Trustees—Powers of Sale —Interpretation of Statutes.*—A testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," etc.: *Held*, the language used, that the property "shall not be disposed of, sold, or used in any other manner," etc., manifested an intention to effectuate the trust, and to permit a sale if the purpose declared would be promoted thereby; and, further, if the power to sell and reinvest in other lands suitable for a rectory is not contemplated by the will, it is not forbidden, and may be done under section 2673 of the Revisal. *Church v. Ange*, 314.

2. *Wills—Devises—Widow's Dissent—Dower—Creditors—Interpretation of Statutes.*—Where a widow, a devisee and executrix under her husband's will, does not dissent from the will within the period of time required by the law, and has qualified and acted as executrix for seventeen months, and then files her dissent and claims her dower

WILLS—*Continued.*

interest, which is set apart to her, the effect of her act at that time, if the lands devised do not exceed the quantity she would be entitled to by right of dower, is to secure to her the lands devised free from the claims of creditors of the estate during her natural life (Revisal, sec. 3082); and thus taking under the will, the decree for dower does not in strictness confer any other estate on her. *Lee v. Giles*, 541.

3. *Same—Dower—Possession—Constructive Notice.*—Where the widow and devisee of her husband has her dower interest in his lands set apart for her after the period of time allowed therefor by statute, and subsequently mortgages the land devised and allotted to her, being in possession thereof, the proceedings for dower, based on a petition containing allegations of insolvency, is not constructive notice to the mortgagee of the insolvency of the testator's estate; and he has a right to assume that the mortgagor, being in possession and holding the lands under the devise, more than two years after the testator's death, without any proceedings of record brought by creditors of the estate, or judgments against it, is the sole owner and had the right to convey the lands thus held. The application of this doctrine of constructive notice, in this case, is not affected by an heir at law joining in the execution of the mortgage. *Ibid.*

4. *Wills—Devises, "Fee Simple"—Interpretation of Statutes.*—A devise of land is construed to be in fee simple, unless otherwise expressed, or the intent of the testator, gathered from the will itself, shows to the contrary. Revisal, 3138. *Jones v. Richmond*, 553.

5. *Wills—Interpretation—Devises, Fee Simple—Trusts and Trustees—Descent and Distribution.*—Where by an item in a will, which is complete in itself and requires no further construction of the other parts of the will to show the intent of the testator, a devise of lands is made to four of his children, appointing a trustee to whom the executors are to turn over the real and personal property therein mentioned, to be used by him in his discretion for their maintenance and support until the youngest devisee becomes 21 years of age, and then the trustee may apportion among them certain amounts, either in money or property, as he may deem proper and right: *Held*, that the fee-simple title of the lands devised in this item vested in the four children therein named, subject to the trust imposed, and upon the death of one of them during minority it descended to her heirs at law. *Ibid.*

6. *Same—Fee Simple—Contingent Limitations.*—Where in a certain item of a will a bequest is made to four of the testator's children named in the preceding item, "not to be sold, and used for their good. If either of these four last named children should die, the property to go to the survivors of said four children," it is *Held*, that by the use of the word "property," the testator had reference only to the property mentioned in this item, and not to that of the former item, wherein by proper construction the lands therein specified were devised in fee, subject to certain trusts imposed for the benefit of these children. *Ibid.*

7. *Pleadings—Estoppel—Judgments—Caveat.*—Where in an action to construe a will there is allegation that the will is valid, and a party

WILLS—*Continued.*

to that action neither denies the allegation nor requests the court not to proceed with the cause until he has been afforded an opportunity to file his caveat, and the matter has been finally adjudicated and distribution under the will directed, the party thus acting is thereafter barred of any right he may have had to caveat the will and have it set aside. *In re Will of Lloyd*, 557.

8. *Wills—Caveat—Judgment—Estoppel—Limitation of Actions—Interpretation of Statutes.*—While the filing of a caveat to a will is not barred by the statute until after the lapse of seven years, this does not apply when the party is estopped by a former judgment, Revisal, sec. 3135, not being an enabling statute, but creating a bar from lapse of time where there was none before. *Ibid.*

9. *Wills—Devises—Latent Ambiguity—Extrinsic Evidence—Declarations of Testator.*—A devise of the testator's "homestead tract" of land, when it appears that the buildings, outhouses, etc., where he had resided were on a tract containing 200 acres, but that he had acquired other adjoining tracts, from different persons at different times, presents a case of latent ambiguity, admitting extrinsic evidence to fit the description, and in this case, for that purpose, it was competent to show testator's declarations respecting it at the time of making the will, and at other times, his manner of dealing with the lands, etc. *Fulford v. Fulford*, 601.

10. *Wills—Devises—Latent Ambiguity—Evidence Excluded—Unanswered Question—Appeal and Error.*—Where a devise of lands, by its description, causes a latent ambiguity so as to admit of extrinsic evidence for its location or extent, the refusal of the trial court to allow witnesses to answer questions as to its boundary or location, without statement as to what the answers would be, will not be held for error. *Ibid.*

11. *Wills—Land Sold for Distribution—Executors and Administrators—Power of Sale.*—The general rule that where land is devised to be sold for division among the heirs or devisees, without more, the executor is without power to convey, does not obtain when a contrary intention appears from the terms of the will. *Lumber Co. v. Swann*, 566.

12. *Same—Interpretation of Wills—Intent.*—Where a will disposes of a large real and personal estate, and directs very generally a sale for division among the heirs and legatees, and concludes with the provision that the executors shall "to all intents and purposes execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof," the intention of the instrument is to confer on the executors the power to sell and convey the lands for the division specified therein. *Ibid.*

WITNESSES. See Evidence.

Instructions—Negligent Killing—Measure of Damages—Expenses—Witnesses Interested.—Upon the issue of the measure of damages, in an action to recover for the intestate's alleged negligent killing, and to find the net loss occasioned by the wrongful death, the mother of intestate testified that he was put to no expense for his washing, for she did that for him: *Held*, it was proper for the judge to ex-

WITNESSES—*Continued.*

plain to the jury that the interest of this witness should be considered, and the charge, upon the evidence in this case, is approved. *Speight v. R. R.*, 80.

WITNESSES, EXPERT. See Trials.

WORDS AND PHRASES. See Insurance; Vendor and Purchaser.

1. *Taxation—Charitable Purposes—Words and Phrases.*—Apart from the view that the Revenue Act of 1911, ch. 46, professes to deal with corporations which have been favored with exemptions, and giving the statute a more general application, the exemption specified as to rents applies only to those "used exclusively for charitable or benevolent purposes," and a devise of lands to trustees directing that the rents be applied to "charitable, benevolent, and religious purposes" does not come within the statutory exemption. *Davis v. Salisbury*, 56.

2. *Instructions—Criminal Actions—Reasonable Doubt—"Fully Satisfied"—Burden of Proof—Words and Phrases.*—On trial for a criminal offense, the judge is not held to any set formula as to reasonable doubt, in his instruction upon the quantum of proof in order to convict, and, upon conflicting evidence, an instruction that the jury "must be fully satisfied of defendant's guilt before they can convict him," is not erroneous. *S. v. Charles*, 286.

3. *Deeds and Conveyances—Ejectment—Descriptions—Definite Tract—"Formerly Owned."—Wards and Phrases.*—Where in an action for the possession of lands, both parties claiming from a common source of title, the first deeds in defendant's chain recite the lands as the land "formerly owned by" A., but in the deed made directly to him it is described as "the land known as the A. tract," it is *Held*, there is a difference in the designation of the lands, for the lands, as to a whole or part, may have been owned by A., while describing the land as the "A" tract at least raises a question for the determination of the jury as to whether a separate and distinct tract by that name was conveyed, it being some evidence of location. *Madry v. Moore*, 295.

4. *Wills—Property—Words and Phrases—Interpretation—Intent—Items Construed Together.*—While the word "property" is broad enough under some circumstances to embrace realty as well as personalty, it will not be so construed as to apply the language used in one item of the will, where it was so intended, to another item which is complete in itself and expresses a different intent. *Jones v. Richmond*, 553.

WRIT OF POSSESSION. See Appeal and Error.